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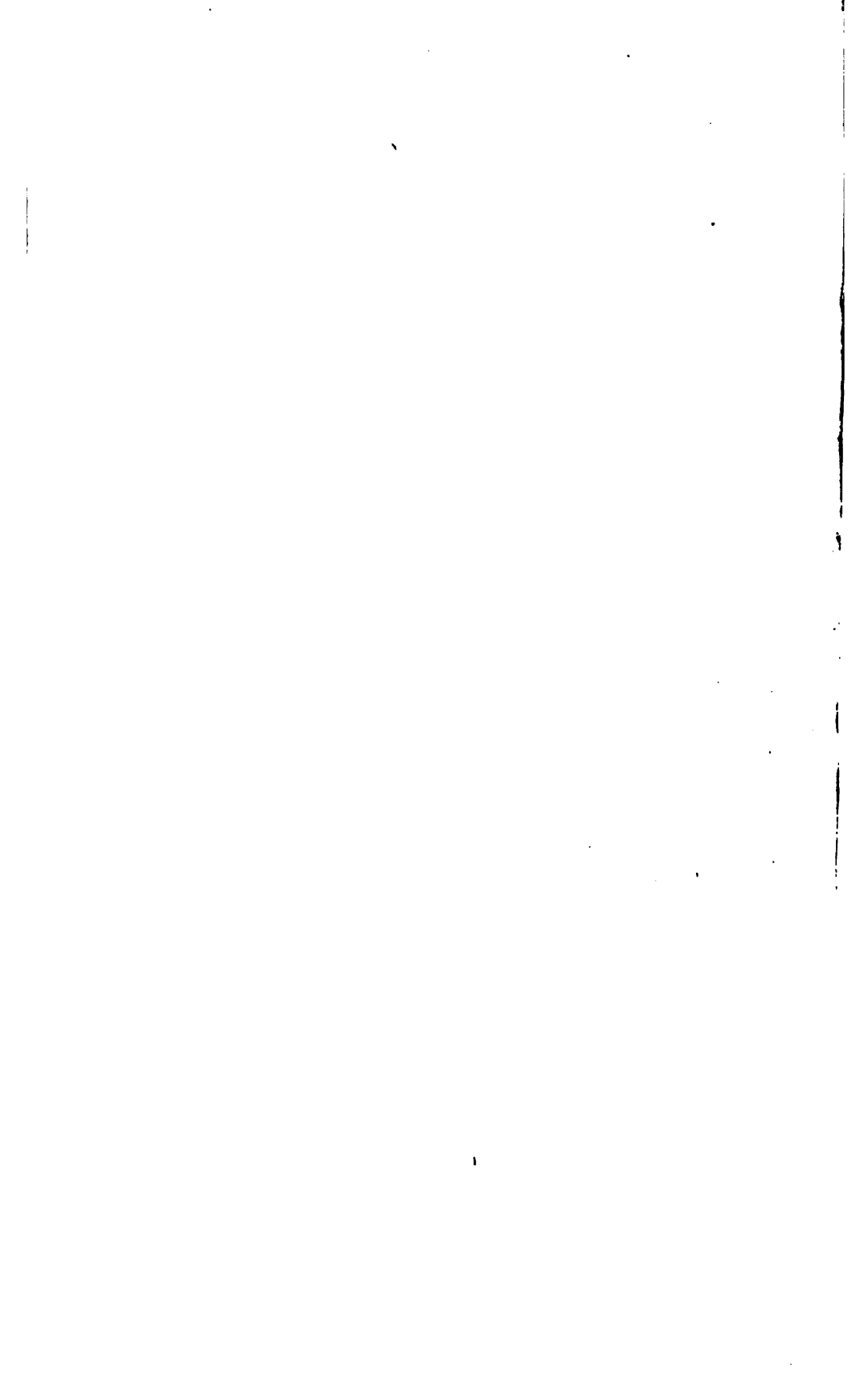
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41

VOL. 48 - N. Y. COURT OF APPEALS.

1	204	348	540
57 1 36	d 55 71	80 209	134 1486
d 72 1615	d 55 698	365	545
6	66 610	54 1220	58 1273
98 1 35	d 77 148	108 2391	76 1351
189 2289	d 116 96	118 2268	116 1 65
61 2249	212	180 2480	c 75 2208
128 2 67	74 1122	374	556
17	77 1179	82 1524	84 1662
51 652	88 1805	122 4 74	128 2 12
d 65 359	96 1542	879	561
118 598	119 1549	68 489	144 2150
27	127 1590	385	571
143 1571	54 2515	d 59 1277	60 1486
34	94 2286	890	95 1201
d 66 1445	218	d 85 1864	95 2202
41	98 47	92 1611	585
59 1217	225	142 1284	100 109
96 1531	58 1128	61 1529	57 1632
65 1568	65 1448	88 1581	76 1474
118 1285	77 1143	188 1387	182 1256
62	d 97 1878	399	57 1622
67 1543	120 1265	60 1542	188 1572
86 2278	188 1 98	84 1128	b 653
70	55 2 71	114 2 44	116 409
76 1 75	118 2616	415	b 655
144 1101	253	67 2290	69 470
68 1555	74 2 92	188 2 21	121 467
126 2178	85 2 86	54 1468	657
63	118 2281	110 2 59	s 56 98
54 1327	54 1584	438	b 658
54 1332	64 1119	50 679	52 644
66 1389	69 1285	78 220	o 660
100 1382	71 4 28	81 645	69 470
117 1 88	74 4 98	109 657	76 318
53 2 57	78 1153	127 644	76 314
92 2611	78 1323	438	b 668
123 2496	88 1154	64 1358	84 521
89 1184	85 4 40	446	b 669
106	117 264	68 2258	128 468
62 1552	184 127	456	b 671
92 1879	260	75 294	57 631
98 1299	65 1 30	478	o 676
102 1141	110 1541	L 60 1269	66 390
108 1460	375	184 1372	75 153
140 1605	59 283	486	111 177
111 2486	378	61 1 65	180 230
181 2460	53 1380	59 2282	130 412
109 1496	54 1324	74 1188	662
132	66 1497	77 1546	51 273
124 1266	75 1547	132 1325	71 331
124 1271	66 2495	67 1536	684
62 1179	125 2 5	498	89 453
65 1167	292	59 262	687
109 2286	141 52	59 2617	84 2658
143	305	127 1447	
59 312	94 1333	513	
80 206	313	92 1 82	
80 210	53 1258	126 1212	
163	70 1227	144 1 61	
88 618	70 1357	55 2602	
94 48	71 1416	121 249	
169	82 1411	77 1494	
48 1802	99 2480	520	
178	82 1412	57 2862	
63 1184	57 1116	532	
86 1239	71 1417	79 1127	
102 1398	127 1212	83 1 61	
70 812	326	88 1244	
188	53 1285	98 1174	
119 1554	344	d 144 1187	
193	61 632	85 2622	
137 2229	73 210		

ABBREVIATIONS USED - c, criticized; d, distinguished; L, limited; o, overruled; s, same case; small figures indicate the section to which reference applies; \* indicates reference is to a point not mentioned in syllabus; - indicates not enough of opinion is given to determine what point in syllabus is referred to.



# Vol. 48. NEW YORK REPORTS.

Cited in the following series:

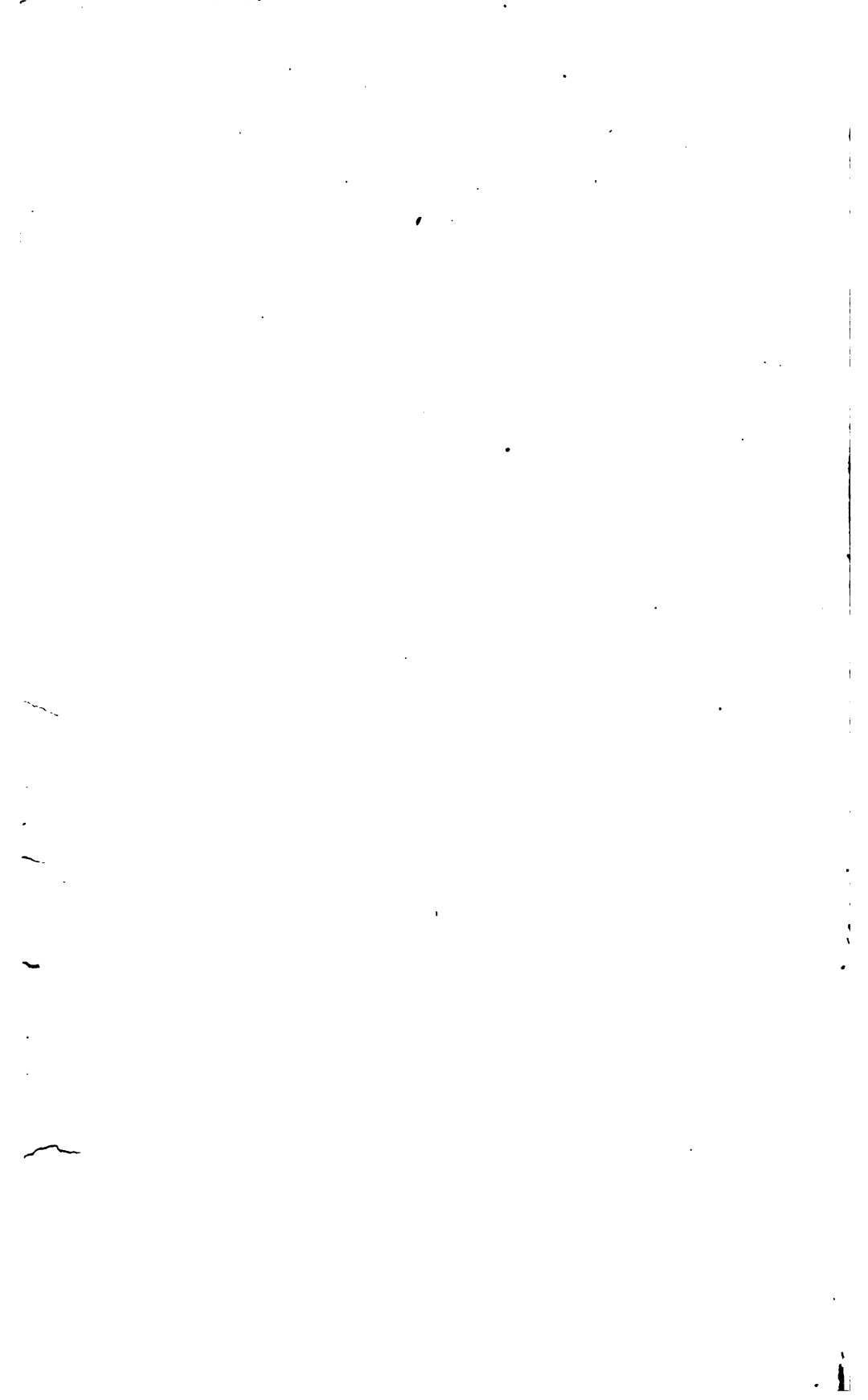
U. S. Supreme Court (US; LEd, Lawyers' Edition); Federal Reports (Fed); Massachusetts (Mas); Connecticut (Con); New Jersey Law (NJL); New Jersey Equity (NJE) and the Lawyers' Reports, Annotated (LRA) and its Annotation (n).

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N. B.—Cut out and stick each block on page at its head, or citations for entire volume on inside front cover.

**Always consult this table before using a case.**

1:91 US 102	163:168 Mas 302	278:226 NJE 566	415:69 Fed 797	561:151 Mas 363
23 LEd 212	178:13 LRA 350n	31 NJE 189	5 LRA 156n	5 LRA 725
63 Fed 362	30 LRA 115n	44 NJE 250	430:94 US 845	19 LRA 722n
76 Fed 974	188:8 LRA 468	7 LRA 278n	24 LEd 231	571:126 Mas 79
6:16 Fed 70	13 LRA 721	10 LRA 725n	95 US 759	585:97 US 107
1 LRA 319n	19 LRA 33n	13 LRA 702n	24 LEd 583	24 LEd 981
1 LRA 650n		15 LRA 60	11 LRA 548	99 US 683
9 LRA 441	193:91 US 55	27 LRA 459n	21 LRA 237n	25 LEd 406
17:1 LRA 656n	23 LEd 207	292:5 LRA 233n	446:5 LRA 324n	103 US 820
6 LRA 788n	93 US 62	305:12 LRA 339n	456:12 LRA 459n	26 LEd 618
14 LRA 232n	23 LEd 802	313:95 US 743	472:60 Fed 594	30 Fed 688
27:6 Fed 220	53 Fed 418	24 LEd 576	35 LRA 621	39 NJE 534
34 Fed 381	54 Fed 38	13 LRA 68n	478:17 LRA 580n	51 NJE 429
34:3 LRA 444n	120 Mas 112	348:83 Fed 381	486:8 LRA 727n	2 LRA 48n
41:11 LRA 156n	180 Mas 440	4 LRA 682n	10 LRA 293n	2 LRA 615n
57:12 LRA 50n	4 LRA 525n	6 LRA 498n	492:45 NJL 520	4 LRA 716n
62:11 LRA 156n	201:21 LRA 730n	8 LRA 504	498:3 LRA 344n	8 LRA 553n
70:48 NJL 278	204:141 US 577	365:124 US 313	36 LRA 652	624:7 Fed 848
12 LRA 254	35 LEd 866	33 LEd 899	513:85 US 627	9 Fed 784
39 LRA 239	50 NJL 564	14 LRA 493n	21 LEd 938	86 Fed 153
98:23 Fed 739	5 LRA 625	374:101 US 62	48 Fed 774	655:26 LRA 396
11 LRA 837	20 LRA 788n	25 LEd 997	31 NJE 463	668:8 LRA 746n
106:31 Fed 522	36 LRA 448	123 US 521	1 LRA 680	689:13 LRA 508
148 Mas 203	312:166 US 885	33 LEd 528	22 LRA 702n	671:36 Fed 461
1 LRA 433n	41 LEd 1043	12 Fed 700	520:100 US 717	674:9 LRA 108n
7 LRA 732	47 Fed 859	12 Fed 711	25 LEd 742	17 LRA 457n
8 LRA 289n	23 LRA 746n	20 Fed 219	134 US 83	21 LRA 284
8 LRA 746n	218:23 Fed 362	81 Fed 782	38 LEd 825	23 LRA 813n
16 LRA 547n	225:8 LRA 259	129 Mas 327	44 NJL 647	676:14 LRA 214
23 LRA 102n	20 LRA 388	8 LRA 640n	28 LRA 287	682:9 LRA 109n
23 LRA 829n	20 LRA 796n	9 LRA 578		
23 LRA 449n	38 LRA 708	379:23 LRA 243n		
36 LRA 755	247:36 NJL 327	390:2 LRA 801n		
125:3 LRA 823n	253:143 US 190	16 LRA 61n	532:131 Mas 99	
32 LRA 39n	36 LEd 120	16 LRA 732n	139 Mas 238	
132:154 US 20	49 Con 208	34 LRA 245	44 NJL 255	
38 LEd 891	44 NJE 119	37 LRA 387	540:65 Con 428	
23 Fed 318	5 LRA 47n	399:59 Fed 975	57 NJL 613	
112 Mas 74	5 LRA 278n	28 NJE 239	29 LRA 371	
113 Mas 303	6 LRA 610n	12 LRA 701n	545:5 LRA 590	
3 LRA 845n	12 LRA 243n	408:5 LRA 156n	556:19 LRA 467	
4 LRA 611n	25 LRA 289			
12 LRA 799n	290:1 LRA 346n			
36 LRA 714				



REPORTS OF CASES

DECIDED IN THE

COMMISSION OF APPEALS <sup>p</sup>

OF THE  
48

STATE OF NEW YORK,

INCLUDING A PORTION OF THE DECISIONS OF THE SEPTEMBER TERM,  
1871; THE DECISIONS OF THE JANUARY TERM, AND A  
PORTION OF THOSE OF THE MAY TERM, OF 1872;

WITH

NOTES, REFERENCES AND INDEX.

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BY H. E. SICKELS,  
COUNSELOR-AT-LAW.

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*Commissioners.*

\* Resigned May 9th, 1872.





## TABLE OF CASES

**REPORTED IN THIS VOLUME.**

[illegible]

F.		J.	
	PAGE.		PAGE.
Fancher, First National Bank of		James v. Gurley.....	163
Sandy Hill v.....	524	Jersey City Insurance Company,	
Fernandez et al. v. Great West-		Ludwig v.....	379
ern Insurance Company....	571	Johnson, Lynch v.....	27
Fernandez et al. v. New York			
Mutual Insurance Company..	571		
Ferris v. Kilmer.....	300		
Fisher v. Hepburn.....	41		
First National Bank of Sandy			
Hill v. Fancher.....	524		
Fitzgerald, Trustee, etc., v. Top-			
ping.....	438		
Fonda v. Sage et al.....	173		
Fredericks et al., People ex rel.			
B. & S. L. R. R. Co. v.....	70		
Furman et al., Conklin v.....	527		
G.		K.	
Gager v. Babcock.....	154	Kerr et al. v. Blodgett et al....	63
Gillespie, Hamill v.....	556	Kelly, Sheriff, etc., Downing v.,	433
Gillott v. Esterbrook et al.....	374	Keokuk Coal Company of New	
Great Western Insurance Com-		York, Thorp v.....	258
pany, Fernandez et al. v.....	571	Killmore v. Howlett....	569
Guernsey et al., Scott et al. v...	106	Kilmer, Ferris v.....	300
Gurley, James v.....	163	Knox et al., Miller v.....	232
		Koop et al., Bunge et al. v.....	225
H.		L.	
Hamill v. Gillespie.....	556	Lanning v. Carpenter et al....	408
Hammett v. Linneman et al....	399	Leitch et al. v. Wells, President,	
Happy v. Mosher et al.....	313	etc., et al.....	585
Hennessey, Pitcher v.....	415	Liney, Ball v.....	6
Hennessey impl'd, Ontario		Linneman et al., Hammett v...	399
Bank v.....	545	Long Island Ferry Company v.	
Hepburn, Fisher v.....	41	Terbell, Ex'r, etc.....	427
Heydorn, Central Bank of Troy		Loucks et al., Parsons et al. v...	17
v.....	260	Loughlin, impl'd, etc., Ran-	
Hicks v. Cleveland.....	84	dolph v.....	456
Higgins, Rector, etc., Trinity		Ludwig v. Jersey City Insurance	
Church, New York v.....	532	Company.....	379
Hills v. Place.....	520	Lynch v. Johnson.....	27
Hinds et al., Amsbry v....	57		
Hoffman v. Armstrong... ..	201		
Holt, Cook et al. v.....	275		
Hotchkiss v. Mosher impl'd, etc.,	478		
Howlett, Killmore v.....	569		
Hudson River Railroad Com-			
pany, Nelson v.....	496		
		M.	
		Marine Bank of Chicago, v.	
		Wright et al.....	1
		McGinnis et al., Voorhees, Re-	
		ceiver, et al. v.....	278
		McKenzie v. Smith.....	143
		Meriden Brit. Company v. Zing-	
		sen.....	247
		Miller v. Knox et al.....	232
		More v. Bennett.....	472
		Mores v. Salisbury.....	636
		Mosher et al., Happy v.....	313
		Mosher, impl'd, etc., Hotchkiss	
		v.....	478

# TABLE OF CASES REPORTED.

vii

N.		PAGE.		PAGE.
Nelson v. Hudson River Rail- road Company.....	498		Richardson v. Crandall.....	348
Newell v. Wheeler.....	486		Roop et al., Erie County Savings Bank v.....	292
New Jersey Steamboat Com- pany, Swarthout v.....	209		Ruhl v. Phillips et al.....	125
New York Mutual Insurance Company, Fernandez et al. v.,	571		Ryan v. Ward et al.....	204
Nolan et al., Western Railroad Company v.....	518			
O.			S.	
O'Hara, Pope v.....	446		Sage et al., Fonda v.....	178
Ontario Bank v. Hennessy, impl'd, etc.....	545		Salisbury, Morris v.....	636
P.			Salt Springs National Bank v. Wheeler.....	492
Parsons et al. v. Loucks et al....	17		Scott et al. v. Guernsey et al....	106
Pennsylvania Railroad Com- pany, Rawson v.....	212		Sheldon et al., Beck v.....	365
People ex rel. B. & S. L. R. R. Co. v. Barker et al.....	70		Shepard, Powers v.....	540
People ex rel. B. & S. L. R. R. Co. v. Fredericks et al.....	70		Smith, Calkins et al. v.....	614
People ex rel. Westbrook et al. v. Trustees of Village of Og- densburgh.....	390		Smith, McKenzie v.....	143
Phillips et al., Ruhl v.....	125		Smith v. Van Olinda et al.....	169
Pitcher v. Hennessy.....	415		Snow et al. v. Columbian Insur- ance Company.....	624
Place, Hills v.....	520		Stickney v. Bartow et al.....	198
Pope v. O'Hara.....	446		Supervisors of Erie County, B. & S. L. R. R. Co. v.....	98
Potter v. Ellice.....	321		Swarthout v. New Jersey Steam- boat Company.....	209
Powers v. Shepard.....	540			
R.			T.	
Randolph v. Loughlin, impl'd, etc.....	456		Ten Eyck, Commercial Bank of Albany v.....	305
Rawson v. Pennsylvania Rail- road Company.....	212		Terbell, Ex'r, etc., Long Island Ferry Company v.....	427
Rector, etc., Trinity Church, New York, v. Higgins.....	582		Thomas v. Bartow et al.....	193
Reed v. United States Express Company.....	462		Thorp v. Keokuk Coal Company of New York.....	253
			Tillotson v. Wolcott.....	188
			Topping, Fitzgerald, Trustee, etc. v.....	488
			Trustees of Village of Ogdens- burgh, People ex rel. West- brook et al. v.....	390
			U.	
			United States Express Company, Reed v..	462
			United States Telegraph Com- pany, Breese et al. v.....	132

## TABLE OF CASES REPORTED.

V.

V.		PAGE.
Van Olinda et al. Smith v.....	169	
Voorhees, Receiver, et al. v. McGinnis et al.....	278	
W.		
Ward et al., Ryan v.....	204	
Wells, President, etc., et al., Leitch et al. v.....	585	
Welts v. Connecticut Mutual Life Insurance Company....	34	
Western Railroad Company v. Nolan et al.....	518	
Wheeler, Newell v.....	486	
Wheeler, Salt Springs National Bank v.....		493
White et al. v. Williams.....		344
Whitehouse v. Bank of Coopers-town, impl'd.....		239
Williams, White et al. v.....		344
Wolcott, Tillotson v.....		188
Worrell v. Exchange Bank of Lockport et al.....		326
Wright et al., Marine Bank of Chicago v.....		1
Z.		
Zingsen, Meriden Brit. Co. v..		247

**W.**

**Z.**

	PAGE.
Wheeler, Salt Springs National Bank v.....	493
White et al. v. Williams.....	344
Whitehouse v. Bank of Coopers-town, impl'd.....	389
Williams, White et al. v.....	344
Wolcott, Tillotson v.....	188
Worrell v. Exchange Bank of Lockport et al.....	326
Wright et al., Marine Bank of Chicago v.....	1

Z.

Zingsen, Meriden Brit. Co. v..	247
--------------------------------	-----

## TABLE OF CASES IN MEMORANDA.

B.	PAGE.	E.	PAGE.
Babcock v. Hermance.....	668	Eastwood et al. v. McNulty et al.,	668
Bald et al., Baldwin v.....	673	Edwards v. Conger.....	676
Baldwin v. Bald et al.....	678	Elsworth v. Caldwell et al.....	680
Blackmar, Pettibone v.....	689		
Blackmar, W. & O. Col. Inst. v.	668	F.	
Blake et al., Strong v.....	662	Field et al., Magaw v. ....	668
Blodgett et al., Wilson v.....	658	Fielding et al., Waugh v.....	681
Blood, Cramer, Rec'r, etc., v....	684	Fitch v. Russell.....	672
Brackett et al. v. Wyman et al..	667	Fox, impl'd, etc., Smith et al v.,	674
Brand v. Brand et al.....	675	Freeman, impl'd, etc., Church v.,	678
Brisbane, Wakeman et al. v....	678		
Bush v. Roch. City Bank et al..	659		
C.		G.	
Caldwell et al., Elsworth v.....	680	Gibbs et al. v. Van Buren.....	661
Central Bank, Troy, v. Heydorn,	670	Gould, Tyler v.....	682
Church v. Freeman, impl'd, etc.,	678	Graham, Donley v. ....	658
Clark, Phillips v.....	677	Graves, impl'd, Sands, rec'r, v..	653
Clough v. Murray.....	676	Gt. W. R. R. Co., Levy et al. v.,	675
Cochrane, Jeffres v.....	671	Green v. Kennedy .....	658
Cole v. N. Y. C. R. R. Co.....	679	Green v. Plank .....	669
Com. Mu. Fire. Ins. Co., Hotch-		Griswold v. Cook .....	670
kiss v.....	656		
Conger, Edwards v .....	676	H.	
Cook, Griswold v.....	670	Hadden et al. v. Dimmick .....	661
Cramer, Rec'r, etc., v. Blood....	684	Henken, Divoll v.....	672
D.		Hermance, Babcock v.....	683
Day v. Monteath, adm'r, etc....	660	Heydorn, Cent. Bk. Troy v.....	670
Divoll v. Henken . . . . .	672	Hills, Tanner v. ....	662
Dimmick, Hadden et al. v.....	661	Hoagland v. Trask.....	686
Douglass et al. v. Dudley.....	688	Hook, Newton v. ....	676
Donley v. Graham....	658	Hotchkiss v. Com. Mu. F. Ins.	
Dudley, Douglass et al. v.....	688	Co. ....	656
		Hud. R. R. R. Co., Murray v. . .	655

## TABLE OF CASES IN MEMORANDA.

J.		P.	
	PAGE		PAGE
James, Oddy v.....	685	Pettibone v. Blackmar.....	689
Jeffres v. Cochrane.....	671	Phillips v. Clark.....	677
		Pike et al., Kellogg v.....	689
		Pike v. Walter.....	681
		Plank, Green v.....	689
		Prink et al., Tracy v.....	685
K.		R.	
Kellogg v. Pike et al.....	689	Redpath et al. v. Vaughn et al..	655
Kennedy, Green v.....	688	Robbins et al., Comm'rs, etc.,	
Krom et al. v. Levy.....	679	Stackpole v.....	665
Krum, Thrall et al. v. ....	686	Roch. City Bk. et al., Bush v...	659
		Root et al., Taylor et al. v.....	687
		Russell, Fitch v.....	672
L.		S.	
Lévy et al. v. Gt. W. R. R. Co.,	675	Sands, Receiver, etc., v. Graves,	
Levy, Krom et al. v.....	679	impleaded.....	658
Lippincott et al., Smith v. ....	680	Schott v. Schwartz.....	666
		Schwartz, Schott v.....	666
		Smith et al. v. Fox, impleaded..	674
		Smith v. Lippincott et al.....	680
		Spader, Taylor v.....	664
		Stackpole v. Robbins et al.,	
		Comm'rs, etc.....	665
		Stearns, impleaded, etc., Wilder	
		et al. v.....	656
		Strong v. Blake et al.....	662
M.		T.	
Magaw v. Field et al.....	668	Tanner v. Hills.....	662
Marshall et al. v. N. Y. C. R. R.		Taylor et al. v. Root et al.....	687
Co. ....	660	Taylor v. Spader.....	664
McNulty et al., Eastwood et		Terry, Receiver, etc., v. Wait,	
al. v. ....	668	impleaded, etc.....	657
Monteath, adm'r, etc., Day v....	660	Thrall et al. v. Krum.....	686
Murray, Clough v. ....	676	Tracy v. Prink et al.....	655
Murray v. H. R. R. R. Co. ....	655	Trask, Hoagland v.....	686
		Tyler v. Gould.....	682
N.			
Newton v. Hook.....	676		
N. Y. C. R. R. Co., Marshall et			
al. v.....	660		
N. Y. C. R. R. Co., Cole v.....	679		
O.			
Oddy v. James.....	685		

# TABLE OF CASES IN MEMORANDA.

xi

V.		PAGE.
Van Buren, Gibbs et al. v. ....	661	Wakeman et al. v. Brisbane. .... 678
Vaughn et al., Redpath et al. v. ....	655	Walter, Pike v. .... 681
		Waugh v. Fielding et al. .... 681
		W. & O. Col. Inst. v. Blackmar, 668
		Whipple et al. v. Whipple et al., 677
		Wilder et al. v. Stearns, im-
		pleaded, etc. .... 656
		Wilson v. Blodgett et al. .... 658
		Wyman et al. v. Brackett et al.. 667
W.		
Wait, impleaded, etc., Terry,		
Receiver, etc., v. ....	657	





# TABLE OF CASES

CITED IN THE OPINIONS IN THIS VOLUME.

A.		PAGE.	
	PAGE.		
Aberdeen v. Blackmar .....	537	Belden v. Campbell..... 159	
Aiken v. Benedict .....	208	Belden v. N. Y. and H. R. R. R. Co..... 108	
Albany and S. R. R. Co. v. Os- born .....	104	Belmont v. O'Brien .....	272
Allen v. City of Buffalo.....	187	Binney v. Plumsby .....	255
Allen v. Coit .....	552	Bissel v. Drake.....	485
Allen v. Williams .....	5	Bishop of Winchester v. Paine..	608
Am. Ex Co. v. Hain.....	470	Bissel v. N. Y. C. R. R. Co.....	142
Amoskeag Man. Co. v. Spear...	377		508, 512
Anderson v. Coonley.....	509	Blanchard v. Trim.....	388
Andrews v. Rowan.....	191	Bloom v. Burdick.....	99
Anstey v. Marden.....	250	Blossom v. Todd.....	216
Atcheson v. Mallen .....	362	Bogert v. Hertel .....	595
		Booth v. Bunce.....	171
		Borst v. Spelman .....	216
		Botsford v. McLean .....	388
		Boyd v. Hitchcock .....	207
		Boyd v. Shorrock .....	284
		Bronson v. Wiman .....	20
		Bromley v. Coxwell .....	495
		Brooks v. Gibbons .....	66
		Brown v. Butchers' and Dro- vers' Bk. ....	308
		Brown v. Nichols .....	33, 160
		Brown v. Tayleur .....	577, 581
		Bryant v. Commonwealth Ins. Co. ....	159
		Bull v. Ketchum.....	62
		Bull v. Willard .....	198
		Burnett v. Phalon .....	376
		Burnham v. Onderdonk .....	54
		Burr v. Beers .....	257
		Burrall v. Acker .....	361
		Burwell v. Jackson.....	198
		Buswell v. Poiner.....	208
		Butterworth v. Gould .....	389

B.	
Bailey v. Jackson.....	272
Bailey v. The Mayor, etc., of N. Y. ....	61
Baker v. Bliss .....	340
Bangs v. Duckinfield.....	53
Bank of Attica v. N. and T. Bk. ....	605
Bank of Rochester v. Jones ...	8
Bank of Rochester v. Monteath,	551
Bank of Utica v. Smalley.....	605
Barhyte v. Shepherd..	99, 105, 518
Barker v. Bininger.....	166
Barker v. Bucklin.....	636
Barker v. N. Y. C. R. R. Co....	467
Barnett v. Emerson .....	272
Barry v. Longmore.....	8
Bartlett v. Judd .....	422
Beach v. Ranney .....	563
Beals v. Home Ins. Co.....	382

**C.**

C.	PAGE.
Cady v. Allen .....	537
Cairns v. Bleecker .....	495
Caldwell v. Cassidy.....	528
Capen v. Peckham .....	282, 291
Catlin v. Hull .....	398
Chace v. Hinman .....	587
Champion v. Bostwick .....	553
Chapman v. City of Brooklyn..	490
Christensen v. Am. Ex. Co....	509
Christophers v. Sparke .....	272
Church v. Sparrow .....	551
Churchill v. Gardner .....	255
Churchill v. Hunt .....	536
City Bank v. Rome, W. and O. R. R. Co. ....	8
City of Utica v. Churchill .....	526
Clark v. Lyman .....	169
Clerk v. Shee .....	363
Climie v. Wood .....	284
Coffin v. Newburyport M. Ins. Co. ....	584
Cole v. Sackett .....	281
Com. Bk. Buffalo v. Kortright,	598
Conklin v. Conklin .....	123
Corning v. Gould .....	455
Ooon v. Knappe .....	207, 208
Crain v. Fox .....	455
Cooper v. Greeley .....	475
Crest v. Armour .....	228
Crippen v. Morrison .....	291
Crooke v. Andrews .....	186, 491
Crookshank v. Burrell .....	19
Croswell v. Weed .....	477
Courtright v. Stewart .....	24
Cox v. Clift .....	179
Cullwick v. Swindell .....	284
Culpepper v. Austin .....	603
Cunningham v. Freeborn .....	621
Curtis v. Ward .....	15
Curtis v. Roch. and Syr. R. R. Co. ....	211
D.	
Darke v. Clayton .....	272
Day v. Orient Ins. Co. ....	583
Decker v. Matthews .....	389, 497
Dedrick v. Leman .....	228
Deming v. Barclay .....	495
Deming v. Williams .....	216
De Peyster v. Michael .....	268
De Puy v. Strong .....	325
Dive v. Mowingham .....	360
Devine v. Lee .....	607
Dobson v. Pearce .....	422
Doe v. Heiler .....	274
Dole v. Bull .....	359
Donovan v. Willson .....	20
Dorr v. N. J. S. B. Nav. Co....	508
Downs v. Ross .....	20
Draper v. Stonvenel .....	369
Dubois v. Baker .....	459
Dubois v. Beaver .....	208
Dwight v. Benton .....	495
E.	
Edgerton v. Thomas .....	598
Edmonston v. McLoud .....	38
Egberts v. Wood .....	66
Elliot v. Piersol .....	99
Elliot v. Welmer .....	582
Evans v. Kymner .....	496
Everett v. Saltus .....	507
Ex parte Reed .....	169
F.	
Failing v. Schenck .....	273
Fellows v. Northrup .....	369
Ferguson v. Kimball .....	299
Ferriass v. N. A. F. I. Co. ....	231
Filkins v. Whyland .....	208
Finch v. Newenham .....	603
Fish v. Cottenet .....	383
Fisher v. Fisher .....	238
Fisher v. Hall .....	825
Ford v. Cobb .....	289, 291
Fosgate v. Herkimer Manufac- turing and Hydraulic Co. ....	55
Fowles v. Bowen .....	564
Fox v. Phelps .....	271

# TABLE OF CASES CITED.

xv

PAGE.		PAGE.	
French v. B., N. Y. & E. R. R. Co.....	142	Hopkins v. McLaren .....	603
Fryatt v. Sullivan Co. ....	287, 289	Houghtailing v. Lewis.....	198
Furniss v. Hone.....	402	House v. House.....	284, 288
G.		How v. Hall.....	485
Gansevoort v. Williams.....	631	Hoyt v. Com. of Taxes.....	395
Garbutt v. Watson.....	20	Hunt v. Johnson.....	606
Garfield v. Hatmaker... ..	228	Hunt v. Rousemanier's Adm'rs.	418
Gay v. Mead.....	468		428
Gibson v. Haggerty.....	82	Hyde v. Bruce.....	627
Gilbert v. Manchester.....	605	I.	
Gilbert v. Wiman.....	536	In re Galloway... ..	236, 258
Giles v. Banemar.....	271	In re Heller .....	128
Gilpin v. Lady Southampton... ..	68	In re Negus .....	587
Glorie v. S. C. R. R. Co.....	108	In the Matter of Empire City Bank.....	817
Grace v. Adams.....	142	J.	
Graham v. Londonderry.....	216	Jackson v. Andrews.....	608
Grant v. Morse.....	369	Jackson v. Daws.....	274
Green v. Armstrong.....	570	Jackson v. Hotchkens.....	272
Green v. Putnam.....	123	Jackson v. Losee.....	608
Green v. Slayter.....	608	Jackson v. Matsdorf.....	223
Griffith v. Griffith.....	608	Jackson v. Port.....	536
H.		Jackson v. Pratt.....	271
Hall v. Robinson.....	92	Jackson v. Wood .....	271
Hall v. Sampson.....	560	Jacques v. Marquand... ..	551
Hamilton v. Cummev.....	187	Jeffrey v. Bigelow.....	509
Hammond v. Tillotson.....	54	Jenkins v. Hopkins.....	278
Hanmer v. Wilsey.....	14	Jerman v. Denniston.....	246
Harp v. Osgood.....	364	Jervis v. Jolliffs.....	495
Harrison v. Close.....	206, 228	Jewett v. Jewett.....	452
Harvey v. Martin.....	497	Jeune v. Ward.....	497
Havens v. Patterson .....	323	Johnson v. Brown.....	564
Hathaway v. Brayman... ..	560	Judd v. Ensign.....	649
Hatch v. Dewey.....	179	Judson v. Gray .....	686
Hawley v. Foote.....	281	Jumel v. Jumel.....	299
Hayden v. Bucklin... ..	594, 608	K.	
Hendrickson v. Beens... ..	207	Kellogg v. Richards.....	207, 208
Higgins v. Whitney.....	14	Keenholtz v. Becker .. ..	567
Hill v. Sewald.....	291	Kemble v. Rhinelander.....	627
Hill v. Wentworth.....	291	Kittell v. Wiggins.....	582
Holbrook v. Wright.....	12	King v. Talbott.....	599
Holden v. Coates.....	208	Kortright v. Com Bk. Buffalo..	598

L.

	PAGE.		PAGE.
Laplace v. Aupoix.....	495	Mohawk & Hudson R. R. Co. v. Artcher .....	518
Latin v. McCarty .....	422	M. & H. R. R. Co. v. Clute....	104
Lawrence v. Ball.....	266	Morris v. Slike.....	252
Lawrence v. Fox.....	257, 636	Muldon v. Whitlock.....	231
Le Page v. McCrear.....	207	Murdock v. Gifford... ..	282, 288, 289
Lewis v. Gt. W. R. R. Co..	142, 504	Murray v. Ballou.. ..	594, 608
Lewis v. Smith.....	323	Murray v. Blatchford.....	606
Livingston v. Livingston..	265, 267	Murray v. Burling.....	497
Lobdell v. Lobdell .....	453	Murray v. Lylburn.....	594, 608
Loeschick v. Bridge .....	128		
London v. N. W. R. W. Co....	504	N.	
L. & N. W. R. W. Co. v. Bartlett .....	507	N. Y. Fire Ins. Co. v. Lawrence,	630
Love v. Palmer.....	359	N. Y. Ice Co. v. N. W. Ins. Co.,	422
Lowry v. Tew.....	452	N. Y. and N. H. R. R. Co. v. Schuyler .....	186
Lyon v. Chase.....	267, 270	Neufville v. Thomson.....	216
M.		O.	
Malius v. Brown.....	453	Ohio and Miss. R. R. Co. v. Wheeler .....	102
Malone v. Malone.....	274	Oliver v. Mu. Com. Ins. Co....	425
Mallory v. Gillett.....	250	Oneida Bk. v. Ontario Bk.....	363
Mann v. Eckford's Ex'rs.....	537	Osterhout v. Roberts .....	16
Mann v. Provost.....	54		
Manhattan Brass Manuf. Co. v. Sears .....	553	P.	
Marclay v. Shults.....	468	Palmer v. Davis .....	335
Marine Ins. Co. v. Tucker....	630	Palmer v. Stephens .....	308
Martin v. McCormick .....	198	Palmerton v. Huxford.....	228
Marvin v. Ingles.....	369	Parish v. Golden.....	100
Mason v. Lord.....	369	Parker v. Schenck .....	20
Mayor v. Colgate.....	539	Parks v. Jackson .....	608
Mayor v. Exchange F. Ins. Co..	384	Patrick v. Metcalf.....	339
Matter of Canal and Walker Streets.....	53	Peck v. Brown .....	54
McDaniels v. Lapham.....	208	Pentz v. Stanton .....	552
McDougall v. Cooper.....	208	People v. Bd. Assessors of Albany .....	100, 393
McDowell v. McCullough.....	272	People v. Bd. Assessors of Brooklyn .....	100
McGee v. Roen.....	587	People v. Meighan .....	360
McKee v. Judd.....	92	People v. Sturtevant.....	53, 98
McKenzie v. L'Amoreaux.....	66	People v. Sup'rs of Columbia Co. ....	60
McNeil v. Tenth Nat. Bk..	593, 601		
Mead v. Case.....	20		
Mech. Bk. v. Hazard.....	206		
Mews v. Mews.....	216		
Milfax v. Baker.....	274		

N.

**O.**

P.

# TABLE OF CASES CITED.

xvii

	PAGE.
People v. Sup'rs of Niagara.....	104
People v. Fredericks .....	104
People v. Gardner .....	395
People v. Beardsley.....	104
People v. Cassity .....	104
People v. Holbrook .....	485
Phelps v. Auldjo.....	584
Phillip v. Gorham.....	422
Phillips v. Mornan.....	278
Pierce v. Goddard .....	287
Plumb v. Cattaraugus Co. ....	384
Place v. Union Ex. Co.....	470
Potter v. Cromwell ..	282, 290, 291
Potter, Rec'r, v. Merch'ts Bk. of Albany .....	242
Preston v. Tubbin .....	603
Price v. Powell .....	507
Putnam v. Hubbell.....	360
Putnam v. Ritchie .....	128
Pyle v. Pennock.....	282

## Q.

Quinhy v. Vanderbilt .....	470
----------------------------	-----

## R.

Ransom v. N. Y. & E. R. R. Co..	211
Rathbone v. Clark .....	299
Reed v. Randall .....	373
Read v. Spaulding .....	470
Remnant v. Bremridge .....	288
Rex v. Gardner.....	102
Rhode Island v. Massachusetts,	98
Rice v. Peet .....	354
Ring v. Whitely.....	257
Robertson v. Columbian M. Ins. Co. ....	583
Robertson v. Vaughan.....	20
Robinson v. James.....	166
Rockwell v. Wearing .....	317
Rogers v. Weir .....	12
Ross v. Johns .....	495
Ross v. Johnson .....	24
Rubery v. Stevens .....	236
Rusher v. Sherman.....	99

## S.

	PAGE.
Sackett v. Sackett.....	272
Sackett's Harb. Bank v. Codd..	368
Sands v. Croke.....	437
Savage v. O'Neil.....	606
Schott v. Schwartz.....	537
Scott v. Onderdonk.....	179
Scott v. Pilkington.....	635
Self v. Madox.....	603
Sewell v. Fitch.....	20
Seyd v. Hay.....	495
Seymour v. Davis.....	25
Seymour v. Minturn.....	206
Sharp. v. Johnson .....	490
Sharp v. Speir.....	490
Sheppard v. Steele.....	317
Sherman v. Elder .....	92
Sherry v. Schuyler.....	15
Sherwood v. S. and W. R. R. Co. ....	103
Slocum v. Clark .....	281
Smith v. Brown.....	600
Smith v. Lynes .....	402
Smith v. N. Y. C. R. R. Co. ...	20
Smith v. Surman .....	22
Smith v. Van O'Linda.....	302
Smyles v. Hastings .....	452
Solnies v. Rutgers F. Ins. Co..	384
Sorrell v. Carpenter.....	609
Squire v. N. Y. C. R. R. Co....	508
Stanton v. Ellis.....	99
Stakesburgh v. Smith .....	363
State of N. Y. v. City of Buffalo,	365
Stevens v. Com. Ins. Co....	581, 639
Stewart v. Nicholls .....	272
Stone v. Cooper.....	475
Storm v. Waddell.....	33
Susquehanna Bk. v. Supervisors Broome Co. ....	519
Sweet v. Barney .....	507
Swift v. City of Poughkeepsie..	99
	105
Swift v. Thompson.....	282

## T.

Tallmadge v. Penoyer.....	551
Teaff v. Hewitt .....	291

	PAGE.
Terwilliger v. Wands .....	563
Thomas v. Allen .....	536
Thompson v. Brown .....	66
Thorn v. Knapp .....	564
Titus v. Sumner .....	564
Tobey v. Barber .....	208
Towers v. Osborne .....	20
Trait v. White .....	272
Treuttel v. Barandon .....	496
Trotter v. Hughes .....	257
Trustees First Bap. Ch. v. Brook- lyn F. Ins. Co. ....	368
Tyler v. Heidorn .....	270

V.

Van Allen v. The Assessors . . .	526
Van Rensselaer v. Witbeck . . .	105
Van Rensselaer v. Hays . . .	268, 268
Van Rensselaer v. Read . . . . .	263
Van Rensselaer v. Ball . . . . .	268
Van Rensselaer v. Dennison, 268,	275
Van Rensselaer v. Barringer . .	268
Van Wyck v. McIntosh . . . . .	459
Vedder v. Fellows . . . . .	446
Vos v. Robinson . . . . .	578

**W.**

Walden v. Davison.....	166
Waldron v. Willard.....	92
Walmsley v. Milne.....	284

	PAGE.
Ward v. Weeks.....	564
Ward v. Dewey.....	179
Wareham Bank v. Burt.....	470
Ware v. Westfall.....	198
Waterman v. Topper.....	201
Webb v. Albertson.....	361
Webb v. Pell.....	610
Webb v. Pond.....	537
Webber v. G. W. R. Co.....	470
Webber's Ex'rs v. Blunt.....	360
Weed v. S. & S. R. R. Co.....	467
Wendell v. The People.....	247
White v. Carpenter.....	608
Whitney v. Slauson.....	92
Whitney v. Thomas.....	97
Wilcox v. Jackson.....	52, 99
Wilder v. Keeler.....	66
Williams et al. v. Williams et al.,	243
Williamson v. Brown.....	340
Wilson v. Goit.....	563
Wilson v. Anderson.....	13
Winslow v. Merchants' Ina. Co.,	282
Winter v. Kinney.....	361
Wolcott v. Van Santvoord.....	523
Wolf v. W. U. Tel. Co.....	142
Wood v. Seely.....	180
Wood v. Wood.....	599
Wright v. Hunter.....	487, 458

**Y.**

**York Co. v. Central R. R..... 507**

CASES DECIDED  
IN THE  
COMMISSION OF APPEALS  
OF THE  
STATE OF NEW YORK,

AT THE SEPTEMBER TERM, A.D. 1871.

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THE MARINE BANK OF CHICAGO, Respondent, v. JOB WRIGHT  
et al., Appellants.

Where the consignor of property, upon its shipment and before delivery, draws a bill of exchange upon the consignee, and procures the same to be discounted at a bank upon the security of the bill of lading, which is transferred and delivered with it, the bank acquires title to the property described in the bill of lading, conditional upon the acceptance of the draft; upon such acceptance the title passes to the acceptor; but upon refusal to accept, the title continues unimpaired, and upon the receipt by the consignee of the property, and its conversion, he is liable to the bank for the money advanced upon it.

Where the consignor is indebted to the consignee for advances, and has agreed to give him a prior security upon the property, the lien of the latter is good as against the former; but the consignee does not thereby obtain any right to the property, as against a *bona fide* pledge of the bill of lading for value, made prior to the delivery of the property to the consignee.

(Argued May 11, 1871; decided September term, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 46 Barb., 45.)

The action was to recover the value of a cargo of corn  
SICKELS—VOL. III. 1

shipped from Chicago to Buffalo, and thence to New York by one Viets, consigned to defendants.

On the 17th day of November, 1859, at Chicago, H. Viets made his bill of exchange for \$3,500 at sight, directed to the defendants in New York. On that day the plaintiff discounted the bill for Viets for value. At the same time, and as security for the payment of the bill, Viets transferred and delivered to the plaintiff the bill of lading of a cargo of corn shipped on board the "Lummis," consigned to the defendants. The defendants received the corn, but refused to pay the bill, they having notice of the transfer to the plaintiff before receiving the corn. The defendants claimed to hold the corn for a general balance due them from Viets, and also that a draft for \$1,220 paid by them for Viets, should be deducted from the amount of the recovery. The plaintiff recovered judgment at the circuit for the amount of the draft with interest, which upon appeal was affirmed by the General Term of the first district.

*Thomas D. Hall* for the appellants.

*James Emott* for the respondent. The transfer of the bill of lading for value will prevail against the factor or consignee's lien for a general balance of account. (*Bank of Rochester v. Jones*, 4 Comst., 497; *Conrad v. Atlantic Ins. Co.*, 1 Peters, 444; *Allen v. Williams*, 12 Pick., 297.) When defendants received the corn they took it subject to the existing rights of the plaintiff. (*Barry v. Longmore*, 12 A. & E., 639.)

HUNT, C. The facts, as found by the referee, having been affirmed by the General Term, are conclusive upon this appellate court. Such facts, with such assumptions and inferences as may be necessary to sustain the report, and not inconsistent therewith, are to be taken by us as the facts upon which the decision is to be made. In this view, nearly the entire argument of the appellants' counsel fails of its application. It



would have been pertinent and forcible before the referee, whose duty it was to determine the facts. It would have been quite appropriate before the General Term, where the right to review the facts existed. In this court, the facts are few and do not present the points argued. Viets made his draft on the defendants for \$3,500 and presented it to the plaintiff for discount, with the bill of lading as security. The plaintiff advanced the money on the draft, and immediately transmitted it, with the bill of lading annexed, for the acceptance of the defendants. It was promptly presented to the defendants in that form. That the defendants happened to be absent from their office, and that their clerk failed to inform them that the bill of lading was annexed to the draft, was their misfortune. The fact, however, of legal notice that the draft and the bill of lading were thus connected together, that the one was security for the other, was thus clearly brought home to the defendants.

The transfer of the bill of lading to the plaintiff, under the circumstances stated, transferred also the title to the corn described in it. The transfer was conditional and limited, to wit, to provide for, and until the acceptance of the draft. The title would then pass to the acceptors as their security, and the plaintiff's security would be transferred to the personal liability of the defendants as acceptors. The defendants having refused to accept the draft, the title of the plaintiff to the corn continued unimpaired. (*Bank of Rochester v. Jones*, 4 Com., 497; 2 Kent's Com., 207; Par. Mer. Law, 346; *City Bank v. Rome, W. & O. R. R. Co.*, decided December, 1870.)

The defendants received the corn, subject to the rights of the plaintiff, and, having applied it to their own use, are liable to the plaintiff for the money advanced upon it. (*Barry v. Longmore*, 12 Ad. & E., 639.)

Under the principle stated, no allowance can be here made to the defendants for the \$1,220 draft. The referee does not find that it was accepted on account of the corn shipped by the "Lummis." We cannot assume that it was. Indeed, the

evidence is quite strong to the contrary, that draft being made on the 8th of November, and this corn not being shipped until the 17th of the same month.

As the case comes before us, the judgment must be affirmed with costs.

LEONARD, C. The money of the plaintiff was loaned on the security of the bill of lading which was attached to and delivered with the bill of exchange drawn by Viets upon the defendants. The referee has so found the fact.

The evidence tending to establish the fact was contradictory, the cashier testifying to facts favorable to the plaintiff's claim in that respect, and H. Viets to the contrary effect for the defendants. The fact, as found, must be accepted by this court.

The money was used by Viets in the purchase of corn in the ear, which was shelled at Chicago and shipped by him to the defendants at New York. If the corn was purchased for the defendants, and they were in fact its owners, and Viets was their agent in purchasing, then the money was, in effect, borrowed and used by their agent for their account, and they are liable for it, as they would be to the seller for the corn purchased.

If Viets was the owner, and the effect of the agreement between him and the defendants for the shipment of the corn purchased was to enable them to realize their advances to Viets and commissions, then clearly the title was in him, and he had the most perfect power to pledge the bill of lading, which carried the title to the corn in question as security for the plaintiff's loan.

The purchase of corn by Viets for his own account, although made under an agreement with defendants that they would advance for its purchase, and that it should be shipped to them for sale at New York, from the proceeds of which their advances were to be repaid, would give the defendants no valid security for their advances upon the corn, as against a *bona fide* pledge for value of the bill of lading given on its ship-

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Opinion of the Commission, per LEONARD, C.

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ment at Chicago, and before the corn came to the possession of the defendants, or while it was in the possession of Viets. The whole of it results in this: Viets agreed to give the defendants security upon the corn which he was to purchase, prior to any other claim. He failed to keep his agreement with them. The defendants trusted him, and he, for some reason, broke his agreement. The defendants' lien was good as against him. The defendants do not thereby obtain any legal or equitable right to the corn, against a *bona fide* pledge of that or the bill of lading for it, made for value, while Viets had the corn in his possession. The defendants must look to Viets for their damages, but cannot hold the corn as against such pledge. If the referee had found the facts as claimed by the defendants, no valid defence against the right of the plaintiffs to hold the corn, or its proceeds, under the bill of lading, would have been established.

As to the advance of \$1,220: The evidence did not indisputably prove that it was made for the freight and charges on this particular corn, nor that it was so applied. But if it were so, their equity would not stand against the pledge of the evidence of title to the corn for value. The defendants took no security against the corn. They relied on the promises of Viets alone. He has disappointed them, and they can look to him, and to the corn as against him, but not to the corn as against the pledge of the bill of lading for value. These principles are fully sustained by the cases of *The Bank of Rochester v. Jones* (4 Comst., 497), and *Allen v. Williams* (12 Pick., 297).

The judgment should be affirmed.

All concur.

Judgment affirmed.

## Statement of case.

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MARCUS BALL, Respondent, v. ARCHIBALD LINEY, Appellant.

A bailee of property, to which there are adverse claimants, has the right to refuse to deliver the same for such reasonable time as will enable him in good faith to investigate the facts as to the real ownership thereof. But after such time has elapsed, and after the owner has offered to give a bond of indemnity satisfactory to the bailee, a refusal to deliver the property is a conversion.

If such bailee desires to relieve himself from the embarrassment of conflicting claims and from the responsibility of deciding between them, he can do so by commencing a suit in the nature of a bill of interpleader against the different claimants, and thus have their rights to the property judicially determined.

After a conversion of property, the title still remains in the owner, and the property can be taken from the wrong-doer upon an execution against the owner in favor of a third person, sold, and the proceeds applied upon the owner's debt. In such case the wrong-doer can set up the seizure and sale in mitigation of damages. It is not the fact of the seizure which gives the defence, but that the property has been seized under such circumstances that the owner has had or could have the benefit of it.

Defendant had in his possession as bailee certain property belonging to plaintiff, which he refused to deliver up on demand. Subsequent to such refusal the property was seized and sold by virtue of an execution against one G., and the proceeds applied in satisfaction thereof. The sheriff at the same time had in his hands an execution against plaintiff, but nothing was done by virtue thereof. In an action for the conversion,—*Held*, that the fact that such execution was in the hands of the sheriff was not proper to be considered in mitigation of damages.

(Argued May 11, 1871; decided September term, 1871.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial district, reversing judgment in favor of plaintiff, entered upon report of a referee and granting a new trial. (Reported below, 44 Barb., 505.)

This action was brought against the defendant, a warehouseman, to recover the value of certain goods stored with him by the plaintiff, and was commenced by the service of summons August 14, 1862. The complaint was served on the 18th day of October, thereafter, and alleged, in substance, that, about April 1, 1862, the defendant received in store the plaintiff's goods, worth about \$2,500 to keep until demanded;

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Statement of case.

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that defendant collusively permitted third parties to take away some portion thereof; that plaintiff demanded the goods about August 5, 1862, of the defendant, offering to pay the charges thereon, but defendant unjustly refused to deliver same; wherefore, plaintiff demands judgment for \$5,000., and interest from August 5, 1862.

The answer contains: 1st. A general denial. 2d. Denies the fraudulent and collusive removal by third persons, and alleges they were taken without defendant's knowledge or assent. 3d. Alleges that the residue were, about 1st of August, 1862, seized and taken by the sheriff of Rensselaer, on three executions (particularly described in the referee's report), in favor of third persons, two of which were against George G. Gregory, and the third against the plaintiff in this action, and were, by said sheriff, sold under said executions on the 16th of October, 1862.

The action was duly referred and tried before the referee. He reported in favor of the plaintiff for the entire value of the goods, with interest; and the defendant duly excepted thereto, and, separately, to such portions thereof and such decisions of the referee as were adverse to him. The other material facts in the case are contained in the report of the referee, by which he found the following facts:

That, on the 31st day of March, 1862, and at the other times mentioned in the complaint in said action, the plaintiff was the sole owner of the goods and property mentioned in said complaint.

That the defendant, at the time aforesaid, in connection with his other business, kept a warehouse at the city of Troy, N. Y.

That, at the date aforesaid, the plaintiff sent the said goods and merchandise, in charge of one George G. Gregory, to the said warehouse of said defendant for storage.

That, on the day aforesaid, said defendant duly received said goods and merchandise and put the same into his said warehouse for storage.

That, on the day following such storage of said goods and

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Statement of case.

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merchandise in said warehouse, and while they were in the keeping of said defendant, the said Gregory, with the knowledge of said defendant, marked the boxes and packages containing said goods and merchandise with the letters G. G. G., agent.

That said marks and letters were put upon said boxes and packages, by said Gregory, without the knowledge, authority or consent of said plaintiff.

That no contract was made in reference to the storage of said property when the defendant so received the same.

That, within a day or two after the delivery of said property to said defendant, the plaintiff called upon him and personally informed said defendant that said goods and merchandise belonged to him, said plaintiff, and were sent by him to his, said defendant's, warehouse for storage, and that said defendant must not allow said property to be removed without the order of the plaintiff, to which defendant assented.

That, on the day following the storage of said property with the defendant, as above found, the said Gregory, without the knowledge or authority of the plaintiff, left with the said defendant a paper of which the following is a copy:

"A list of articles stored by George G. Gregory, agent, with A. Liney, River street, Troy, N. Y. The said goods not to be given up without the consent of said George G. Gregory." [Here followed a list of the articles.]

That, on the 28th day of April, 1862, the plaintiff gave to the defendant a notice in writing, of which the following is a copy:

MR. A. LINEY—*Dear Sir*: Mr. Gregory has furnished me with an invoice made by him of the goods in storage in your loft, and you will please hold the same subject only to my written order. The property is mine.

Yours,

M. BALL.

TROY, April 28, 1862.

That the defendant duly received said notice, and shortly thereafter told the plaintiff he would act upon it.

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Statement of case.

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That, on the 15th day of May, 1862, said plaintiff went to the warehouse of said defendant and personally demanded his said goods, at the same time offering to pay all defendant's charges, and said defendant refused to deliver them to the plaintiff, alleging for a reason that he had been forbidden to do so by Gregory; that he was apprehensive of trouble about it, and wanted a delay until he could see Gregory. That said plaintiff thereupon offered said defendant a bond of indemnity upon the removal of said property, to be satisfactory to said defendant, and that said defendant refused to allow the plaintiff to have said property and goods.

That, on the 30th day of July, 1862, said plaintiff made personally a similar demand and with similar offers, and said defendant again refused to deliver said property to said plaintiff.

That, on the morning of the 5th of August, 1862, said plaintiff went again in person to said defendant, and again demanded of him the delivery to him, plaintiff, of his said goods, and offered to pay all charges thereon and to indemnify said defendant upon the removal, and said defendant refused to deliver said property at that time, but requested said plaintiff to call again in the afternoon. That, in compliance with said request, said plaintiff went again in the afternoon of that day to the warehouse of said defendant and again demanded his said goods, again offering to pay all defendant's charges and to indemnify him for their removal.

That, in the interval between the first and second visit of said plaintiff to said defendant on said day, said defendant consulted with George G. Gregory at the office of A. A. Lee, Esq., his attorney. That Gregory then forbade the delivery of said goods to said plaintiff, and said defendant, under the advice of his attorney, again refused to let the plaintiff have his said goods.

That, on the 6th day of August, 1862, the sheriff of Rensselaer county levied upon said goods, having in his hands two executions issued out of this court against George G. Gregory, one in favor of Henry B. Harvey for \$5,386.46, upon a

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Statement of case.

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judgment recovered January 26, 1861, the other issued by A. A. Lee, Esq., in favor of one John R. Jaffray and others for \$1,234.01, upon a judgment recovered June 2d, 1862. That, at the time of the levy upon said goods by said sheriff, said defendant pointed out said goods, but in no way objected to the seizure of them by said sheriff.

That the said Harvey execution was issued to said sheriff August 2d, 1862, and the execution in favor of Jaffray and others August 4th, 1862. That there had been previously an execution issued to the said sheriff upon the said Jaffray judgment and returned wholly unsatisfied.

That no levy was ever made upon said property nor any authority asserted by the said sheriff in any way before said 6th day of August, 1862.

That on the 7th day of August, 1862, an execution was issued out of this court to the said sheriff against this plaintiff on a judgment recovered April 3, 1861, for \$5,645.07, in favor of one Moses T. Clough.

That no formal levy was ever made upon the property in controversy under this last mentioned execution.

That on the 23d day of August, 1862, said sheriff advertised to sell the interest in said goods of said Gregory and this plaintiff, by one advertisement of sale, by virtue of several executions, the sale to take place on the 30th day of August, 1862. That said proposed sale was adjourned from time to time until October 16th, 1862, by posting up notices of adjournment attached to said first advertisement.

That on said 16th day of October, 1862, said sheriff opened a sale of said goods by stating publicly that he would sell the same under the execution in Harvey against Gregory, and thereupon immediately proceeded to and did sell goods on that execution alone, and said goods were bid off by Harvey for \$1,200, and the proceeds of said sale were applied upon said execution of Harvey against Gregory; and that said goods were subsequently taken possession of by said Harvey, and kept and converted by him to his own use.

That said sheriff was indemnified by separate bonds in both



## Statement of case.

judgments for the levy and sale of said goods, and was also indemnified in both cases upon the application of the money bid upon said sale of said goods.

That, after such sale and such application of the proceeds, and after November 1st, 1862, said sheriff returned the execution in favor of Clough against this plaintiff wholly unsatisfied.

That the defendant withheld said goods from the plaintiff when demanded as aforesaid, with the intent and for the purpose of thereby benefiting the said George G. Gregory and in collusion with him.

That said merchandise, on the 15th day of May, 1862, was of the value of \$4,000. And he ordered judgment for the plaintiff for that sum and interest. The defendant appealed from the judgment to the General Term of the third district, and the judgment was reversed and new trial granted. The plaintiff appealed to this court, giving stipulation for judgment absolute in case the order granting a new trial should be affirmed. The other facts appear sufficiently in the following opinion.

*John H. Reynolds* for appellant. Defendant's refusal to deliver made him liable as in an action for conversion. (2 Kent's Com., 566, 567; *Covell v. Hill*, 2 Seld., 384; *Bates v. Stanton*, 1 Duer, 85; *Rogers v. Weir*, 84 N. Y., 463, 469; *Wilson v. Anderson*, 1 B. & A., 456; *Holbrook v. Wright*, 34 Wend., 169.) Where right of action is once vested, it can be destroyed only by a release under seal, or by a receipt of something in payment or satisfaction. (*Beall v. Trull*, 23 Wend., 306; *Allair v. Whitney*, 1 Hill, 484; S. C., 1 Comst., 305; *McKnight v. Dunlop*, 1 Seld., 537.) As goods were not sold and applied in payment of plaintiff's debt, damages cannot be mitigated. (*Hanmer v. Wilsey*, 19 Wend., 91.)

*John B. Gale* for respondent. There was no conversion by defendant. (*Scovill v. Griffith*, 2 Kern., 509; *Solomon v. Dawes*, 1 Esp., 83; 2 Buls., 312; Buls. N. P., 46; *Green v. Dunn*, 3 Camp., 215; *Gunton v. Marse*, 2 Brod. & Bing.,

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Opinion of the Commission, per EARL, C.

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449; *May v. Harvey*, 13 East., 179; *Alexander v. Southey*, 5 B. & A., 247; *Spencer v. Blackman*, 9 Wend., 168; Edw. on Bailments, 56, 130, 287, 306, 558; *Hill v. Covell*, 1 Com., 522; *Martin v. Elwood*, 11 Paige, 376; *Bates v. Stanton*, 1 Denio, 79.) Assuming a conversion, the title was not changed, but continued in owner. (*Osterhout v. Roberts*, 8 Cow., 43; *Silsbury v. McCoon*, 3 N.Y., 379.) The proceedings under execution against plaintiff deprived defendant of the goods. (3 R. S., 5th ed., 644, § 13; *Ray v. Birdseye*, 5 Denio, 619, 625; *Lambert v. Paulding*, 18 John., 311; *Beals v. Allen*, id., 363; *Jones v. Atherton*, 7 Taunt., 56; *Cresson v. Stout*, 17 John., 116; *Van Winkle v. Udall*, 1 Hill, 559; *Peck v. Tiffany*, 2 N. Y., 451; *Fenton v. Folger*, 21 Wend., 676.) And subsequent sale under process of third party is available in mitigation of damages. (*Higgins v. Whitney*, 24 Wend., 379; *Sherry v. Schuyler*, 2 Hill, 204; *Whitaker v. Merrill*, 28 Barb., 526; 30 Barb., 389; *Curtis v. Ward*, 20 Conn., 204; *Silsbury v. McCoon*, 3 N. Y., 379.)

EARL, C. It is undisputed that the plaintiff owned the goods which were stored with defendant. Indeed, no effort was made upon the trial to impeach his title. The defendant was, therefore, bound, upon demand, to deliver the property to the plaintiff; and an unqualified refusal to do so would, in law, amount to a conversion. (*Rogers v. Weir*, 34 N. Y., 463; *Holbrook v. Wright*, 24 Wend., 169; *Wilson v. Anderson*, 1 Barn. & Ad., 456.) But the defendant insists, that he was so embarrassed by the conflicting claims to the property by the plaintiff and Gregory, that he was justified in not complying with plaintiff's demand.

It was undisputed upon the trial that Gregory was merely plaintiff's agent, and that, as such, he took the property to the defendant's warehouse. He could give the defendant no authority to detain the property from his principal. The defendant had the right to qualify his refusal to deliver the property to the plaintiff until he could in good faith investigate the facts as to the real ownership of the property, and

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Opinion of the Commission, per EARL, C.

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he could properly retain the property for a brief period for that purpose. But he had no right to ask that the plaintiff should get an order from Gregory, his agent, before he would make the delivery; and he had no right to call upon the plaintiff to litigate or quiet Gregory's claim. It does not appear that he prosecuted any inquiries as to the title of the property; and it does not appear that he had any reason to believe that it belonged to Gregory, for, when the latter brought it to the warehouse, he simply claimed to be agent, and marked his name upon the property as agent. But if the claim of Gregory had appeared to be more serious and better founded than it was, the defendant could not justify the detention of the property from the owner after he was offered a bond of indemnity, satisfactory to himself, against such claim. And, further, I can hardly conceive of a case where the bailee would be justified in detaining property from the real owner, from May 15 to August 6, nearly three months, to inquire into the title. The defendant, by his conduct, identified himself with Gregory, and, unless the executions which were issued furnish him a defence, he must stand or fall by his title. His retention of the property so long after he was offered a complete indemnity, satisfactory to himself, against the claims of Gregory, furnish a justification for the conclusion of the referee, that he withheld the goods from the plaintiff in collusion with and for the benefit of Gregory.

If, however, the defendant was so embarrassed by the conflicting claims of plaintiff and Gregory, each claiming to own the goods and to be his bailor, that he could not, even with a bond of indemnity, safely or properly deliver the property to the plaintiff, he could have relieved himself from all responsibility by promptly commencing a suit in equity, in the nature of a bill of interpleader against the plaintiff and Gregory, and thus had the controversy and the right to the property judicially determined. (Story's Eq. Jur., § 805, etc; *Wilton v. Anderton*, 1 Barn. & Ald., 450; Redfield on Car., § 712.)

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Opinion of the Commission, per EARL, C.

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Hence, it is quite clear that the defendant, prior to August 6, became liable to the plaintiff for a wrongful conversion of the property; and we will inquire whether anything occurred afterward to relieve him to any extent from responsibility.

It is not claimed that the executions against Gregory alone in any way affected the rights of the plaintiff; but the defence is based upon the execution against the plaintiff. Nothing was really done by virtue of the latter execution. The property was not sold upon it, and nothing was realized or applied upon it. The property was sold by virtue of the execution against Gregory as his property, and the proceeds applied upon it in satisfaction, *pro tanto*, of Gregory's debt. I do not, therefore, see how it can be claimed that the execution against the plaintiff in any way furnishes any defence. If the property had been sold under that execution, it would have been otherwise.

After a conversion of property, the title still remains in the owner, and the property can be taken from the wrong-doer upon an execution against the owner and sold, and the proceeds applied upon his debt, and the owner will thus have the benefit of the property; and in such case the wrong-doer can set up this seizure and sale, not as an entire defence, but in mitigation of damages, for the reason that it would be unjust for the owner to recover the value of the property after he has thus had the benefit of it. It is not the fact of the seizure that gives the defence, but that it has been seized under such circumstances that the owner has had, or could have, the benefit of it. But to protect the wrong-doer, as the law is settled in this State, the seizure must be at the instance of a third person, and not at the instance of the wrong-doer, or upon process in his favor.

In *Hammer v. Wilsey* (17 Wend., 91), it was held that after the defendant had wrongfully converted a horse, he could not show in mitigation of damages that he had seized and sold the horse upon process in his own favor. But in *Higgins v. Whitney* (24 Wend., 379), the property had been tortiously taken by the defendant, and was afterward

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Opinion of the Commission, per EARL, C.

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taken from him by process against the plaintiff in favor of a third party, and the court held that this could be shown in mitigation of damages upon the ground that, without any agency of the defendant, the property had, since the conversion by him, been taken from him by legal process, and applied to the plaintiff's use, by paying the debt which he owed to a third person. In *Sherry v. Schuyler* (2 Hill., 204), a similar case, the court say: "The evidence offered (that the property had been taken from the wrong-doer upon process against the plaintiff, in favor of a third person) and rejected, was clearly admissible in mitigation of damages, as it would have gone to show that, independent of any agency on the part of the defendant, the property in question had been applied to the payment of the plaintiff's debt, due to a third person." In Connecticut, the courts hold, that the seizure and sale of the property after it has been converted upon process against the owner, can always be shown in mitigation of damages, even in cases where the process was in favor of the wrong-doer himself. In *Curtis v. Ward* (20 Conn., 204), where it appeared in an action of trover brought by A., against B., that subsequently to the conversion complained of, B., had attached the same goods in a suit against A., and having obtained judgment, levied his execution on such goods, and had them applied in satisfaction of his debt against A., all in due course of law, it was held that A. could recover damages only for the original taking of the goods, and the detention of them until they were regularly attached. In this case the principle upon which such a defence in mitigation is allowed, is ably discussed in the opinion of the court. Judge WARRE says: "The plaintiff resists this claim, and insists that he is entitled to recover the value of the goods at the time of the conversion, with interest. This claim of the plaintiff would be well founded had he never, subsequent to the conversion, received any benefit from the property." "For it would be palpably unjust for the owner to recover the full value of his goods in their application to the payment of his debts, and then afterward recover that

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Opinion of the Commission, per EARL, C.

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value from another who has derived no substantial benefit from his property." While this case illustrates the principle upon which this defence in mitigation of damages is based, in allowing the defence to be based upon process in favor of the wrong-doer, it goes further than the cases in this State will warrant.

Hence, I am unable to see how the execution against the plaintiff furnishes any defence to this action. The property was seized and sold by virtue of the execution against Gregory. It matters not that the sheriff might have seized and sold the property as plaintiff's, or that he might have applied the proceeds of the sale upon the execution against the plaintiff. He did not do this. The owner of the execution against the plaintiff did not, so far as appears, claim or desire a sale upon his execution, and he did not claim to have the proceeds of the sale applied upon his execution.

The plaintiff lost and waived nothing by appearing at the sheriff's sale and objecting to the sale. The property remained his until he should receive in some way satisfaction for it (*Osterhout v. Roberts*, 8 Cow., 48), and he could claim it from and sue any person for it until he should procure satisfaction.

After the sale, the owner of the execution against the plaintiff did not claim the proceeds, but Harvey and Jaffray, the owners of the executions against Gregory, seem both to have claimed them, and the plaintiff interested himself to have the proceeds applied upon the Harvey execution instead of the other one. I do not see how this act of the plaintiff could affect his rights, so long as there was no proof or finding of the referee that he did anything to prevent the application of the proceeds upon the execution against himself.

I have thus, by the application of plain principles of law to the facts of this case, reached a conclusion adverse to the defendant. While it may be hard for the defendant to be obliged to pay for this property, he has brought the hardship upon himself by his unnecessary interference with the property and rights of another, and he must abide the conse-

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Statement of case.

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quences of his own voluntary acts. The order of the General Term must be reversed, and judgment upon the report of the referee affirmed with costs.

All concur.

Judgment accordingly.

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WILLIAM H. PARSONS et al., Respondents, v. JACOB LOUCKS  
et al., Appellants.

48	17
118	599

A parol contract to manufacture and deliver a quantity of paper, such paper to be thereafter manufactured at the contractor's mills, is not within the provisions of the statute of frauds. (GRAY, C., dissenting.)

(Argued May 11, 1871; decided September term, 1871.)

APPEAL from judgment of the General Term of the Superior Court, in the city of New York, affirming a judgment in favor of plaintiffs, entered upon the report of a referee.

The action is to recover damages for an alleged breach of contract to manufacture and deliver a quantity of paper.

The referee to whom this case was referred found, and reported as matter of fact:

1st. That on or about the 30th day of October, 1862, it was agreed between the plaintiffs and the defendants, who then were and still are copartners as paper manufacturers, that the defendants should manufacture and deliver to the plaintiffs, at the city of New York, ten tons, to wit, 20,000 pounds of book paper, similar to other paper which the defendants had previously made for the plaintiffs, as soon as they, the defendants, should finish certain other orders for paper, which they stated they had on hand, and would take about three weeks from said date last mentioned, with a fair supply of water, to finish; and that the plaintiffs on such delivery should pay the defendants therefor thirteen cents a pound, less a discount of five per cent.

2d. That in the month of January, 1863, and in or about

## Statement of case.

the middle of that month, the defendants stated to the plaintiffs that they would not perform the said agreement, or manufacture or deliver said paper, and refused to perform the said agreement, although thereto requested by the plaintiffs, and that the plaintiffs were at all times ready and willing to receive said paper and pay for the same, pursuant to the terms of the said agreement, and that said defendants have never delivered to said plaintiffs said ten tons of paper, or any part thereof, but have refused so to do.

3d. That by reason of the breach of the said agreement the plaintiffs have sustained damage to the amount of \$1,930, as of the time when such breach occurred, the difference between the contract price (thirteen cents, less five per cent discount) per pound, and the market price of such paper (twenty-two cents per pound) at the time of such breach, on 20,000 pounds, amount, to said sum of \$1,930.

As matter of law: That the plaintiffs are entitled to recover of the defendants said sum of \$1,930, with interest thereon since the 1st day of January, 1863, that is to say, the sum of \$2,301.51, with costs.

*Augustus F. Smith* for the appellants. The contract was void under the statute of frauds. (2 R. S., 136, § 3; Chitty on Con., 66; *Rondeau v. Wyatt*, 2 H. Black., 63; *Downs v. Ross*, 23 Wend., 272, 273; *Seymour v. Davis*, 2 Sand.; S. C., 239; *Garbutt v. Watson*, 5 B. & A., 613; *Smith v. N. Y. C. R. R. Co.*, 4 Keyes, 200; *Smith v. Surman*, 9 B. & C., 561; *Courtright v. Stewart*, 19 Barb., 456, 458; *Watts v. Friend*, 10 B. & C., 446; *Wilkes v. Atkinson*, 6 Taunt., 11; dissenting opinion, SMITH, J., in *Mead v. Case*, 33 Barb., 202; Story on Sales, § 260 a, and notes, pp. 270, 274; *Gardner v. Joy*, 9 Metcalf, 177; *Lamb v. Crafts*, 12 Metcalf, 353-6; *Robertson v. Vaughan*, 5 Sand. S. C. R., 1; *Dona-van v. Willson*, 26 Barb., 138; *Crookshank v. Burrill*, 18 J. R., 58; *Stevens v. Santee*, 51 Barb., 532, 545.)

*John E. Parsons* for the respondents. The contract was for work and labor, and not within the statute of frauds.



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Opinion of the Commission, per HUNT, C.

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(*Crookshank v. Burrill*, 18 J., 58; *Sewall v. Fitch*, 8 Cow., 215; *Robertson v. Vaughan*, 5 Sand., 1; *Bronson v. Wiman*, 10 Barb., 406; *Donovan v. Wilson*, 26 Barb., 138; *Parker v. Schenck*, 28 id., 38; *Mead v. Case*, 33 Barb., 202; *Towers v. Osborn*, 1 Str., 506; *Rondeau v. Wyatt*, 2 H. Black., 63; *Cooper v. Elston*, 7 T. R., 17; *Clayton v. Andrews*, 4 Burr., 2101; *Buxton v. Bedell*, 3 East., 305; *Mpfeklow v. Mangles*, 1 Taunt., 318, 320; *Emerson v. Heelis*, 2 Taunt., 42; *Groves v. Buck*, 3 M. & S., 178; *Clay v. Yates*, 36 Eng. L. & E., 540; *Mixer v. Howarth*, 21 Pick., 205; *Spencer v. Cone*, 1 Met., 283; *Hight v. Ripley*, 19 Maine, 137; *Cummings v. Denoltt*, 26 id., 397; *Abbott v. Gilchrist*, 38 id., 260; *Edwards v. G. T. Railway*, 48 id., 379; *Allen v. Jarvis*, 20 Conn., 38; *Eichelberger v. McCauley*, 5 Har. & J., 213; *Bird v. Muhlinbrink*, 1 Richardson, 199; *Cason v. Cheely*, 6 Geo., 554; *Phipps v. McFarlan*, 3 Min., 109; *Bennett v. Nye*, 4 Greene, Iowa, 410.)

HUNT, C. The paper to be delivered was not in existence at the time of the making of the contract in October, 1862. It was yet to be brought into existence by the labor and the science of the defendants. Of the 20,000, pounds to be delivered, not an ounce had then been manufactured. It was all of it to be created by the defendants, and at their mill. In such a case it is well settled, that the statute of frauds, does not apply to the contract. The distinction is between the sale of goods in existence, at the time of making the contract, and an agreement to manufacture goods. The former is within the prohibition of the statute, and void unless it is in writing, or there has been a delivery of a portion of the goods sold or a payment of the purchase-price. The latter is not. The statute reads, "every contract for the sale of any goods, chattels or things in action, for the price of fifty dollars or more, shall be void unless," etc. (2 R. S., 136, § 3.) The statute alludes to a sale of goods, assuming that the articles are already in existence. This distinction was settled in this State in 1820, by the case of *Crookshank v. Burrell* (18

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Dissenting opinion, per GRAY, C.

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John. R., 58), and has been followed and recognized in many others. (*Sewell v. Fitch*, 8 Cowen, 215; *Robertson v. Vaughan*, 5 Sand. S. C. R., 1; *Bronson v. Wiman*, 10 Barb., 406; *Donovan v. Willson*, 26 Barb., 188; *Parker v. Schenck*, 28 id., 38; *Mead v. Case*, 33 id., 202; *Smith v. N. Y. Central R. R.*, 4 Keyes, 194.)

The present is not one of the border cases, in which an embarrassing or doubtful question is presented, as where wheat is sold, but the labor of thrashing remains to be done (*Downs v. Ross*, 23 Wend., 270), or a sale of flour which has yet to be ground from the wheat (*Garbutt v. Watson*, 5 B. & Ald., 613), or the sale of wood or timber which requires to be cut and corded (*Smith v. N. Y. Central R. R.*, *supra*), nor where the defendants might procure other parties to manufacture the paper. (3 Pars. on Contracts, 52.) It was a simple naked agreement to manufacture at their own mills, and deliver at a specified price, 20,000 pounds of paper of specified sizes, no part of which was in existence at the time of making the contract. Indeed, there is no evidence that the rags and other materials from which it was to be manufactured were owned by the defendants, or were in existence, except so far as it may be argued that matter is indestructible, and that in some form they must necessarily have then existed. As to cases of this character, the course of decisions in this State has been uniform. If we desired to do otherwise, we have no choice; we must follow them.

The judgment must be affirmed with costs.

GRAY, C. (dissenting.) I concede that prior to the decision in *Downs & Skelinger v. Ross* (23 Wend., 270), the contract in question would, by an adherence to the rule of construction established in this State, have been held to be a contract for work and labor, not for the sale of goods. As far back as 1820, in *Crookshank v. Burrell*, a contract to make and deliver the woodwork of a wagon was held to be a contract for work and labor. SPENCER, Ch. J., in delivering the opinion of the court, cited *Towers v. Osborne* (1st Strange, 506), which was

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Dissenting opinion, per GRAY, C.

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for the sale of a chariot, to be made, and held not to be within the statute, and *Clayton v. Andrews* (4 Burrows, 2101), which was upon a contract for the sale of wheat, not yet thrashed, and to be thrashed and delivered, which in *Rondeau v. Wyatt* (2 H. Black., 63) and in *Cooper v. Elston* (7 T. R., 14) was held to be well decided for the reason, as he (KENYON, Ch. J.) said in *Cooper v. Elston*, something was required to be done, in order to put the grain in a state in which it was contracted to be sold. ASHHURST, J., concurred, as did LAWRENCE, J., who said there was to be some alteration in the state of the commodity before it was to be delivered, and hence not an unmixed contract for the sale of the grain. SPENCER, Ch. J., in *Crookshank v. Burrell*, said a distinction was made between a contract for the sale of a thing existing and one not yet made and to be delivered, and that however refined the distinction might be, it was well settled and then too late to question it. The question came up again in 1828 (*Sewall v. Fitch*, 8 Cow., 215) upon a contract made in 1825, for the sale of 300 casks of nails, like the work of the wagon, not then wrought out, but to be made and delivered at a future day. SAVAGE, Ch. J., in delivering the opinion of the court, held, upon the authority of *Crookshank v. Burrell*, and the cases there cited, referring specially and with approval to the cases in support of the proposition that a sale of unthrashed grain, to be thrashed and delivered at a future day, was not within the statute, and so he held the contract for the sale of the nails to be. This construction of the statute was acquiesced in until 1840, when the case of *Downs & Skillinger v. Ross* (23 Wend., 270) came up for consideration. That, like the contract in *Andrews v. Clayton*, was for the sale of unthrashed wheat, to be thrashed and delivered. COWEN, J., in a dissenting opinion, conceded that a contract to manufacture and sell would more correctly be considered a sale within the statute, but truthfully stated that the cases referred to had construed the statute to mean a sale unmixed with a contract for labor, and insisted that they ought not, then, out of deference to the more recent decisions

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Dissenting opinion, per GRAY, C.

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in the English courts, to concede that the decisions, though characterized as absurd, were so obviously wrong that they ought then to overturn them. But BRONSON, J., with whom NELSON, Ch. J., concurred, reiterated the doctrine of the cases referred to, so far as they held that a contract for the sale of unthrashed wheat, including in the same contract, and as a part of it, an agreement to thrash and deliver it, as a part of the consideration of the price to be paid for the wheat, was an agreement for work and labor, and not a contract of sale within the statute, and cited the more modern cases in England establishing a new judicial construction of the act, followed by the statute of George IV, chapter 14, in accordance with or declaratory of the meaning of the prior statute, as those decisions had construed it (*Brown on the Statute of Frauds*, § 309); and, in accordance with those decisions, showing, as he claimed, that the English courts had "got back again on the firm foundation of reason and common sense," he held the contract then under consideration to be within the statute. Among the cases he cited was that of *Garbutt v. Wilson* (5 Barn. & Ald., 613); *Smith v. Surman* (9 Barn. & Cress., 561). The former was a contract for 300 sacks of flour not then ground, to be ground and shipped at a future time; the latter was a contract for the purchase of timber, then in standing trees, at a given price per foot when they should be severed from the freehold by the vendor and measured or made ready for measurement. BAILEY, J., held that so long as the vendor was felling the trees and preparing them for delivery he was doing work for himself; and LITTLEDALE, J., whose observations cover the case now under consideration, held that where "contracting parties contemplate a sale of goods, although the subject-matter, at the time, of making the contract, does not exist in goods, but is to be converted into that state by the seller bestowing work and labor upon his property or his own materials, that is a case within the statute." After Justice BRONSON had cited these cases, quoting the language of the respective judges, not only approvingly, but as authority in support of his own opinion,

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Dissenting opinion, per GRAY, C.

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he did not express himself with his usual accuracy when he said *Sewall v. Fitch* was not in point. If the case of *Garbutt v. Watson*, cited by him, was not law, as he affirmed it to be, and the opinions of the respective judges in *Smith v. Surman* quoted by him, which he approved, were also law and in principle to the point then under consideration, so was *Sewall v. Fitch*. One was a contract with a corn merchant for the sale of flour to be manufactured; the other for nails to be manufactured. If one was, as stated in *Smith v. Surman*, a sale of goods, by their being converted into that state by the seller's bestowing work and labor upon his own materials, so was the other. One was to be made out of wheat, and the other out of iron. The difference consists solely in the article to be made and the material out of which it is to be made, and not a whit in the principle involved. The learned judge was careful not to state that the ruling in *Sewall v. Fitch* could be sustained; and, from the views expressed by him, no doubt is entertained that, if a case like it in its facts had been before him, he would have overruled it. The foundation upon which it rested became so undermined by the decision in *Downs & Skillinger v. Ross*, and the approved opinions in the cases cited, that, while the judges then occupying the bench of that court continued to be its incumbents, and not until after the organic law of the State had undergone a change, and with it the judicial system of the State, the case of *Sewall v. Fitch* was not, so far as I have been able to discover, so brought to the attention of our courts as to make it a subject of comment. In 1850, it was, in the court from which this appeal came, a controlling authority. (*Robertson v. Vaughn*, 5 Sandf. S. C., 1, 5.) In that case, a contract for making and delivering molasses shooks and heads was regarded as within the mischiefs the statute intended to remedy, and, therefore, a contract for the sale of goods; but, as it was not distinguishable from *Sewall v. Fitch*, the contract was held not to be within the statute. The judge delivering the opinion observed that, if all the contracts between merchants and manufacturers for the purchase of

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Dissenting opinion, per GRAY, C.

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goods *to be thereafter manufactured* are to be excepted from the statute of frauds, there seemed to be little reason for retaining all those provisions of the statute, which relate to the sale of goods to be delivered on a future day, since it is hardly possible to imagine an exception more arbitrary in its nature and more contrary to the policy upon which the statute is admitted to be founded; and under the circumstances that court thought, "that it belonged only to the court of ultimate jurisdiction to set aside the authority of that decision." It is not a little remarkable that the learned court made no mention of the case of *Downs & Skillinger v. Ross*, and in which the opinion of LITLEDALE, J., in clear conflict with the doctrine of the case of *Sewall v. Fitch*, was quoted and approved. In 1854, the case of *Sewall v. Fitch* was again the subject of comment and disapproved. (*Courtright v. Stewart*, 19 Barb., 455, 458.) It was again the subject of comment in each of the following cases: *Donovan v. Wilson* (26 Barb., 138); *Parker v. Schenck* (28 id., 38); and *Mead v. Case* (33 id., 202). In *Donovan v. Wilson* it was followed, though conceded to have been questioned in *Downs v. Ross*, in *Johnson v. Wanger*, and in *Courtright v. Stewart*. In *Parker v. Schenck* a contract to make and deliver a double-acting pump was held, as the learned judge who delivered the opinion of the court stated, to come "within that class of cases referred to by Judge BRONSON, in *Downs v. Ross*, as cases out of the statute." A closer observation of that case, I think, would have convinced the learned judge that BRONSON did not refer to any case or class of cases which he conceded to be cases out of the statute. In the prevailing opinion in *Mead v. Case*, the case of *Sewall v. Fitch* was a controlling authority, and no mention was made of *Downs v. Ross* in the dissenting opinion. It was approved; *Sewall v. Fitch* disapproved. The inharmonious views entertained and put forth by the courts of this State, and their reluctance to occupy the grounds established by the cases cited and approved by Judge BRONSON and characterized by him as resting upon the firm foundation of reason and common sense, has resulted

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Dissenting opinion, per GRAY, C.

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in bringing a question similar in principle to the consideration of the Court of Appeals. (*Smith v. The N. Y. Cen. R. R. Co.*, 4 Keyes, 180, 199, 200.) It arose upon a verbal contract for the sale of cord-wood, to be worked by the vendor out of a certain lot of standing trees owned by him, and delivered at a future day, at a certain price per cord, and it was held to be within the statute. Judge WOODRUFF, in delivering the opinion of the court, alluding, no doubt, to the cases in which a contract for building a carriage had been held not to be within the statute, said, in substance, that "distinction had been made, that seemed rather designed to evade the statute than to guard against the evils which the statute was designed to prevent," and that there did not seem to be any "sensible reason for holding, in reference to two verbal contracts with wagonmakers for the purchase and delivery of twenty wagons on a future time named, that one is void because one wagonmaker has the wagons on hand, and the other is valid because the other wagonmaker must manufacture them in order to their delivery at the time appointed;" and after quoting the language of BAILEY and LITLEDALE, JJ., referred to and quoted in the opinion of BRONSON, J., in *Downs v. Ross* (*supra*), said he "could not assent to any case which has decided that such a contract is not within the statute." If we are, as I think, we should be governed by the case of *Downs v. Ross*, decided by the Supreme Court, and the case last cited so recently decided in the Court of Appeals, and the principles enunciated in each of them, the judgment in the case we are now considering should be reversed. The fact that the materials out of which the paper was to be manufactured were not designated, or may not have been in being, is quite immaterial. (*Seymour v. Davis*, 2 Sand. S. C. R., 239, 241.) If in the sale of an article to be manufactured, or partly manufactured out of the vendor's own materials, the proportion in which the labor to be bestowed, is to increase the value of the thing sold, is to be taken into consideration, what must the proportion be? No case can be found furnishing a test. If the article upon

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Dissenting opinion, per GRAY, C.

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which the labor is to be bestowed is *in esse*, and designated like the wheat in *Downs v. Ross*, or the trees in *Smith v. The Central R. R. Co.*, is the test, then a contract for the sale of the trees when cut into cord-wood or splinters for matches would be within the statute; for aught that appears, we are at liberty to assert, and I am inclined to think an investigation would show the assertion that the proportionate value is not remarkably unequal of working iron into nails, as in *Sewall v. Fitch*, or unthrashed wheat into merchantable wheat, at the price to be paid for it, as in *Downs v. Ross*, or wheat into flour, as in *Garbutt v. Watson*, or standing timber into cord-wood, as in *Smith v. The Central Railroad Company*, or rags or other materials into paper, as in the case under consideration. Whether the labor which the vendor is to bestow upon his own work is of greater or less value than the material upon which it is bestowed, is not such a test of the character of the contract as to change it from a contract for the sale of goods into a contract for work and labor; and, unless the principles put forth, and which controlled the decisions in *Downs v. Ross*, and in *Smith v. The Central Railroad Company*, are to give way to the overruled opinion of COWEN, J., which that learned judge based solely upon the authority of the early cases to which I have referred, and not upon any just construction of the statute, conceding, as he did, that a contract to manufacture and sell, as this is, would, more correctly, be considered a sale within the statute.

The judgment appealed from should be reversed.

All concur for affirmance, except GRAY, C., dissenting.

Judgment affirmed, with costs.



## Statement of case.

LEONARD J. LYNCH, Appellant, v. EDWARD C. JOHNSON,  
Respondent.

48	27
143	571
48	27
160	648

Sections 292 and 294 of the Code furnish a substitute for the creditor's bill, as formerly used. The service of the order, under those sections, takes the place of the commencement of a suit under the old system, and gives the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of the debtor.

A final order of a judge, in proceedings under section 294, requiring the debtor of a defendant to pay his debt to the plaintiff, renders this lien effectual; and payment, or liability to pay, in pursuance of such order, is a defence to the debtor in an action against him by his creditor, or by an assignee who is not shown to be a *bona fide* purchaser for value of the claim, prior to the accruing of the lien.

(Argued May 12, 1871; decided September term, 1871.)

APPEAL from order of the General Term of the Supreme Court in the first judicial district, reversing a judgment in favor of plaintiff, entered upon a verdict, and reversing an order denying a motion for a new trial, and granting a new trial.

This was an action for the recovery from the defendant, as surviving partner of the firm of Johnson & Bliss, of the balance of \$911.50 due to Henry C. Acker for services rendered to them as clerk, and the further sum of fifty-eight dollars collected by the said defendant as such surviving partner for the said Acker, both of which sums the plaintiff in his complaint alleges to have been assigned by Acker to him, in and by an assignment duly executed to him, on the 1st day of March, 1863, for a valuable consideration. The defendant first put in issue the execution of such assignment generally, and then its execution at the time of its date. He then, after admitting his indebtedness to Acker of the said sum of fifty-eight dollars, collected for him as above stated, and the further sum of \$127 for the balance of his share of the profits on the purchase and sale on joint account of a quantity of lemons, amounting in all to

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Statement of case.

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\$185, sets up the commencement of proceedings for the examination of the defendant as a debtor to Acker in relation to such indebtedness, before Judge INGRAHAM, one of the justices of the Supreme Court, on the return of an execution unsatisfied, issued upon a judgment in that court in favor of Thomas Ryer and William Ryer against said Acker for \$1,191.30, and an order made thereon by the said justice on the 16th day of March, 1863, by which defendant was directed to pay the said sum of \$185, to the said Thomas and William Ryer or their attorney, to be credited on their said judgment.

On the trial of the issues at the circuit, the plaintiff introduced an assignment to him from the said Acker, bearing date, and duly acknowledged before a notary public, on the 5th day of March, 1863, to him (the plaintiff) for the consideration of one dollar, assigning and transferring all the rights, claims and interests he had against the firm of Johnson & Bliss, and against Edward C. Johnson personally, to have and to hold the same for himself at his own risk, and then rested.

The following facts then appeared by the evidence on the part of the defendant Johnson: that an order for his examination, bearing date the 4th day of March, 1863, and the affidavit on which it was granted, were served upon him on that day; that the said order contained a direction for the service thereof and of said affidavit on Acker, and proof of such service on the 6th day of March was given.

Johnson was examined under the order on the 16th day of the same month of March, being the return day thereof, and an order was thereupon made on the same day directing him to pay the said debt of \$185 to the said Thomas and William Ryer, to be credited on their judgment, as alleged in the answer of the defendant.

The said examination was had in the presence of Acker and his attorney, and nothing was said by either of them about an assignment of Johnson's debt to the plaintiff. Acker was not examined on that proceeding.

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Opinion of the Commission, per LOTT, Ch. C.

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It appeared, by the cross-examination of Johnson by the plaintiff, that he had not paid over the money as directed by the order, but had given notes over due therefor, as security, after this suit was commenced. Those notes were not indorsed by Johnson, and he thought they had not been paid.

After this evidence was given, the said Henry C. Acker was examined by the plaintiff in relation to the execution of the assignment.

His testimony on that question is sufficiently stated in the opinion of the chief commissioner.

At its close, the judge charged the jury "that if the assignment by Acker was executed on March 5, 1863, on or before the service, on March 6, 1863, on him of the order of Judge Ingraham of March 4, 1863, the plaintiff was entitled to recover." To which charge the defendant duly excepted.

He also instructed them that the amount the plaintiff, in such case, was entitled to recover, was the said sum of \$189.05, with interest, to which the defendant also excepted.

*Theodore D. Dimon* for appellant. (Points not received by reporter.)

*John E. Parsons* for respondent. Notice to the judgment debtor was not necessary. (*Keness v. Harding*, 4 How., 178; *Foster v. Prince*, 8 Abb., 407; S. C., 18 How., 258, N. Y. Gen. T.; *Seeley v. Garrison*, 10 Abb., 460; *Holmes v. Jordan*, 15 Abb. P. R., 410, note; *Parker v. Hunt*, id.; *Ward v. Beebe*, 15 Abb. P. R., 372; affirmed in 17 Abb., 1; *Gibson v. Haggerty*, 37 N. Y., 554.) The issuing and service of the order created a lien upon the debt, which was perfected by the order directing payment to the Ryers. (*Edmonston v. MoLoud*, 16 N. Y., 544.) Plaintiff took subject to this lien. (*Bush v. Lathrop*, 22 N. Y., 535.)

LOTT, Ch. C. It is unnecessary to consider the effect of the order made by Justice Ingraham, directing the defendant in this action to pay the amount of his indebtedness to Acker

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Opinion of the Commission, per LOTT, Ch. C.

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over to Thomas and William Ryer, his judgment creditors. The plaintiff has failed to establish any right to that sum, and therefore his recovery of it was erroneous. His own testimony clearly established the fact that the assignment under which he claimed his title was not delivered to Lynch, the plaintiff.

He did, it is true, in answer to the question by his counsel, whether the signature to the assignment was his, say that it was; that it was executed in New York on March 5; that he went before a notary and executed it on that day; and he afterward stated that the assignment was executed early in the morning, about nine o'clock; but his cross-examination disclosed the fact that he did not see Lynch, the plaintiff, and that no one was present on his behalf, either at the time the assignment was signed or when it was acknowledged before the notary. He said, on his direct examination, in addition to what he testified, as above stated, in relation to the execution of the assignment, that he, at that time, resided in Syracuse, and that he had come to New York the night before the 5th of March "on some private matters, and to see about this claim," and that he left, on his return to Syracuse, "about noon, eleven o'clock," of the 5th of March, and reached there that night about eight.

On his cross-examination he said that he "got to the city of New York on the morning of the fifth of March, and was there three or four hours;" that the private matters which he had come down about related to his mother's affairs, and also to his own; that Mr. Marcou, his attorney at the time, was one of the persons he saw in reference to them; and on being asked whether he could recollect of seeing anybody else, he answered, "no special persons," and afterward in answer to a question, whether he remembered that he saw anybody else on business which brought him to New York, but Mr. Marcou, he said "I think not." He then, after stating that his business with Mr. Marcou "was in relation to this claim against Mr. Johnson," "to try and collect it;" on being asked whether he made any effort to

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Opinion of the Commission, per LOTT, Ch. C.

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collect it, he answered, "nothing more than what I had to do with Mr. Marcou."

After stating that he had made an effort with him to collect it, he was asked, what was the effort he made; he answered: "I stated to Mr. Marcou the facts in the case, and he advised me to make an assignment." He then, on being asked the question, "that is the effort you made to collect it, by making an assignment?" answered, "yes, sir." He was then asked, if he could remember anybody but Mr. Marcou, whom he saw at that time, whom he knew, and his answer was, "I don't know as I can," and to the question, "You can't recollect anybody whom you saw, whose name you recollect but Mr. Marcou?" He answered: "Not positively; I can't." And after stating that the sheriff served the papers on him, in the proceedings for the examination of Johnson, about the middle of the day, or the next day after he got home, he was asked this question: "Will you swear positively that it was on the fifth of March on which you executed this assignment?" He answered: "I will swear positively, that to the best of my recollection it was."

He was then asked by the court, "Had you left that in his hands for collection previous to the execution of the assignment?" And he said in reply, "I had written to Mr. Marcou about it."

He was then further examined on behalf of the plaintiff, and stated that Mr. Marcou was attending to a real estate suit then pending, in which his mother was interested, and which he had for more than two years been conducting, and that he went to see him about that suit, at the same time he saw him relative to his claim against Johnson. He also stated, in answer to different questions, that Lynch, the plaintiff, was his brother-in-law, to whom he owed money; that he could not recollect how much, but he thought it was nearly \$100, and that it was on that account the assignment was made to him.

Neither Lynch, the plaintiff, nor Mr. Marcou were examined, and no other evidence than I have above referred

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Opinion of the Commission, per EARL, C.

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to was given in relation to the execution of the assignment. That does not warrant the inference that it was ever delivered to or accepted by Lynch, the plaintiff, or that it ever in fact came to his possession, or even his knowledge.

No presumption of such possession or knowledge can, under the circumstances disclosed on the trial, be drawn from its production at that time. It does not appear that the plaintiff was present. Mr. Marcou was his attorney on the record. The complaint is signed by him, and not by the plaintiff, and it is not verified by either of them or by any other person. These facts, in connection with Acker's testimony that the effort he made to collect the claim was by making the assignment under the advice of Mr. Marcou, to whom he had stated the facts, and in answer to a question by the court that he had written to Mr. Marcou about its collection, tend to show that Mr. Marcou was in fact his attorney and counsel, and not of Lynch, in this action. At all events, I find nothing to justify the conclusion that the assignment was ever delivered to Lynch or to any other person for him, and the judge erred in submitting the question to the jury.

The verdict was without evidence to support it, and the judgment entered thereon and the order made at Special Term denying a new trial were properly reversed.

It follows that the order of reversal granting a new trial must be affirmed, with costs and judgment absolute, must be rendered against the appellant with costs.

EARL, C. The proceeding under section 294 of the Code was completely commenced by the service of the order on Johnson, the debtor of the judgment debtor, and all notice of the proceeding to Acker could have been omitted. (*Gibson v. Haggerty*, 37 N. Y., 555.) The direction that a copy of the affidavit and order should be served upon Acker was simply designed to give him notice of the proceeding, and its object or purpose was not to lay the foundation of any proceeding against him personally. What, then, was the effect of the service of the order upon Johnson?

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Opinion of the Commission, per EARL, C.

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Proceedings under sections 292 and 294 of the Code are parts of the same scheme for the collection of debts inaugurated by the Code. These sections furnish a simple substitute for the creditor's bill, as formerly used in Chancery. The commencement of the creditor's suit in Chancery gave the creditor at once a lien upon the equitable assets of the judgment debtor. (*Storm v. Waddell*, 2 Sandf. Ch., 494; *Brown v. Nichols*, 42 N. Y., 26.) He was rewarded as a vigilant creditor, the commencement of his suit being regarded as an actual levy upon the equitable assets of the debtor. Under sections 292 and 294, the service of the order takes the place of the commencement of the suit under the old system, and should give the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of his debtor. (*Edmonston v. McLoud*, 16 N. Y., 544.) This lien was rendered effectual by the final order of the judge, directing the defendant to pay his debt to the plaintiff in the judgment against Acker; and payment, or a liability to pay, in pursuance of that order, is a defence to this action, the plaintiff not having shown himself a *bona fide* purchaser of the claim against the defendant for value.

The order of the General Term should be affirmed, and judgment absolute should be rendered against the plaintiff, with costs.

LEONARD, HUNT, and GRAY, CC., concur with EARL, C.

GRAY, C., concurs with LOTT, Ch. C.

LOTT, Ch. C., expresses no opinion as to question discussed by EARL, C.

Order of General Term affirmed, and judgment absolute against plaintiff, with costs.

DELILAH WELTS, Respondent, v. THE CONNECTICUT MUTUAL  
LIFE INSURANCE COMPANY,\* Appellant.

A provision in a policy of life insurance, forfeiting the policy in case the assured shall enter into any military or naval service without the consent of the company, includes only such service as will require the person entering into it to do duty as a combatant. An employment therefore, by military authorities, in constructing a railroad bridge, is not within the prohibitions of the policy, and does not invalidate it.

At the time of issuing the policy in question, defendant for a further premium of fifty dollars, by a written instrument, gave the assured permission to go south of the thirty-sixth degree of north latitude and reside there during the time of one year; provided, and with the understanding and agreement, that the policy did not insure against death from any of the casualties or consequences of war or rebellion, or from belligerent forces. While engaged in building a railroad bridge, under the direction of the military authorities of the United States, about thirty miles in the rear of the Union army, and still further from the Confederate forces, the assured was shot and killed by two of a party of men not in uniform, who robbed the men employed upon the work and residents near.

*Held*, that the language of the proviso included only death from casualties or consequences of war or rebellion carried on or waged by authority of some *de facto* government; that this case did not come within that limit, and that defendant was liable.

(Argued May 15, 1871; decided September term, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the seventh judicial district, entered on a verdict for the plaintiff, given by direction of the court at circuit. Exceptions heard at the General Term in the first instance. (Reported below, 46 Barb., 412.)

The action is to recover the sum of \$5,000 insured by the defendant, by a policy on the life of Philip J. Welts, payable to the plaintiff, his wife, in ninety days after notice and proof of his death, dated September, 1864.

The policy contains a proviso that in case the said Philip shall, without the consent of the company, previously obtained and indorsed upon the policy, visit those parts of the United States which lie south of the thirty-sixth degree



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Statement of case.

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of north latitude, between the first of June and the first of November, or shall, without such previous consent thus indorsed, enter into any military or naval service whatsoever (the militia not in actual service excepted), the said policy shall be void, null and of no effect. At the time of issuing the policy, the defendants, in consideration of the further premium of fifty dollars, by a written instrument gave the said Philip permission to go south of the thirty-sixth degree of north latitude, and reside there or return, during the term of one year, without prejudice to the policy; provided, and the permission was given with the understanding and agreement, that the said Philip was not insured by said policy against death from any of the casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be.

The defendants allege by their answer :

1st. That the said Philip entered the military service of the United States, and lost his life while in such service.

2d. That he lost his life by the casualties or consequences of war or rebellion, or from belligerent forces, within the proviso or exception of the permission given.

The said Philip was killed by pistol shots at Cedar Hill, in the northern part of the State of Tennessee, on the 31st of October, 1864. The preliminary proof of his death was furnished to the company in due form. At the time of his death he was engaged as superintendent in charge of constructing bridges on the Edgfield and Kentucky railroad, in the employment of the government of the United States, having about fifteen laborers and mechanics assisting in the business under his superintendence. The railroad was under the direction of, and used, or to be used, by the military authorities of the United States for military purposes. He was so employed about thirty miles north and in the rear of the Union army commanded by General Thomas, and eighteen miles south of the northern line of the State. The forces of the rebellion were still farther from the party of laborers, and south of the Union army. Welts, and the

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Statement of case.

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laborers and mechanics whom he was superintending, had no arms, wore no uniforms, and there were no soldiers at the place, nor anywhere nearer than the Union lines at Nashville.

On the afternoon of October 31, 1864, four men on horse-back rode up and inquired if there was any one there who wore a federal uniform. They inquired for the foreman. Mr. Welts replied that he was the man, and they ordered him to come to them, and he did not obey. Two of the mounted men fired their pistols at Welts, shooting and wounding him four times, so that he died the next day. The four then robbed the other men employed there, and also one or two southern men who resided near, and in about ten minutes rode away, without attempting to injure any other person, or making any prisoners, or disturbing the railroad, or the work under construction. The four wore no arms, except navy revolvers, and no military trappings upon their persons or horses, except that two of them wore federal military overcoats, it being common for persons, although not in the Union military service, to wear such garments. They made no statement as to themselves, and it did not appear that they belonged to the Confederate army, or acted under Confederate authority.

At the close of the evidence, the judge directed a verdict for the plaintiff for the amount claimed and interest, to which the counsel for the defendant excepted. The exceptions were heard, in the first instance, at the General Term, and, being there overruled, judgment was entered on the verdict for the plaintiff.

*George T. Spencer* for appellant. The late civil war and its incidents are matters of public history, of which courts are authorized to take judicial notice. (1 Greenleaf's Evidence, 8, 10, 16; *Swinerton v. Columbian Ins. Co.*, 37 N. Y., 174; *Prize Cases*, 2 Black, 667; *The Venice*, 2 Wallace, 259; *Mrs. Alexander's Cotton*, id., 420; *Thorrington v. Smith*, 8 id., 7.) The assured was in military service within the condition of the policy. (Vattel's Law of Nations, 375,

## Statement of case.

§ 179; Act of Congress, January 31, 1862, § 1.) The peril by which assured lost his life was within the proviso of the permit. (*Mrs. Alexander's Cotton*, 2 Wallace, 419; *The Peterhoff*, 5 id., 60; *Thorrington v. Smith*, 8 id., 11; *Sanderson v. Morgan*, 39 N. Y., 231; *Ex parte Milligan*, 4 Wallace, 126, 127; *Hauger v. Abbott*, 6 id., 540, 541; *The Venice*, 2 id., 277; *Circassian*, id., 135; Vattel, 390, §§ 220, 223, 225; p. 400, § 228; McPherson, 117, 118, 119, 121.) The peril was one of the consequences of the war within the intent and meaning of the permit. (*Savage v. Corn Exchange Fire and Inland Ins. Co.*, 4 Bosworth, 19; *Sarles v. Mayor of New York*, 47 Barb., 447; *Thompson v. Hopper*, 38 Eng. Law and Equity R., 39, 46; *Peters v. The Warren Ins. Co.*, 14 Peters, 99, 108, 109; Broom's Legal Maxims, 168; *Tilton v. Hamilton Fire Ins. Co.*, 1 Bos., 372, Opinion of HOFFMAN, Justice; *Ins. Co. v. Tweed*, 7 Wallace, 44; *St. John v. Am. Mut. Fire Ins. Co.*, 11 N. Y., 516; *Tilton v. H. Fire Ins. Co.*, 1 Bos., 372, 383; *Butler v. Weldman*, 3 B. & A., 398, 407; *Swinerton v. C. Ins. Co.*, 37 N. Y., 174; *Mausan v. Ins. Co.*, 6 Wal., 1; *Powill v. Hyde*, 34 Eng. L. & E., 44.) The fact of rebels being robbers on land and pirates on the seas does not preclude their being regarded as belligerents. (*Dole v. Merchants' Mut. Ins. Co.*, 51 Maine, 465; *Dole v. N. E. Mut. Ins. Co.*, 6 Allen's Mass., 373; *Fifuld v. Ins. Co. of State of Penn.*, 47 Penn. State Rep., 166.) See, in this case, opinions of STRONG, AGNEW and READ, JJ. *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen, 308; *Klimworth v. v. Shephard*, 4 Ellis and Ellis, 447.)

*George B. Bradley* for respondent. The persons who killed assured were in no sense belligerents. (*Swinerton v. Col. Ins. Co.*, 37 N. Y., 174; *Kershaw v. Kelsey*, 100 Mass., 561.) The assured was not south of 36 degrees north latitude at the time he was killed, and the proviso of the permit has no application. (*Harper v. N. Y. C. Ins. Co.*, 22 N. Y., 441; *Potter v. A. Ins. Co.*, 5 Hill, 147, 149; 10 Wend., 250; *Van Hagen v. Van Rensselaer*, 18 J., 423; *Elmendorf v.*

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Opinion of the Commission, per LEONARD, C.

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*Lansing*, 5 Cow., 470, 471; *Hoffman v. Aetna Ins. Co.*, 32 N. Y., 413; *Merrick v. Germania Ins. Co.*, 54 Pa., 277.)

LEONARD, C. The policy enjoined it upon Welts that he was not to go south of the thirty-sixth degree of north latitude in the United States, and not to enter into any military or naval service whatsoever, without the consent of the company, indorsed in writing upon the policy, under the penalty of rendering the contract void. At the same time with the issuing of the policy, the company, for a further consideration, granted their written permission to go south of the line of latitude mentioned, for the term of one year, and added to the consent, as a proviso or condition, that it was given with the understanding and agreement, that Welts was not insured by the policy against death from any of the "casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be."

The permission which abrogates for one year the restriction against going south of the thirty-sixth degree of latitude at certain seasons, imposes a new limitation upon the liability of the company, in case of death from certain casualties or consequences of war, rebellion or belligerent forces, which were more to be apprehended in that portion of the United States, at the time the policy was issued, south of the thirty-sixth degree of latitude, and in the vicinity of that line, than the dangers from climatic causes. For the consideration of fifty dollars, the company took the hazard of the climate, and the assured took the risk of the casualties or consequences mentioned.

There is no evidence that the deceased availed himself of the permission to go south of the latitude mentioned; and, at the time of his death, he was clearly north of it, according to approved maps. If there was sufficient evidence, then, to go to the jury, tending to prove that the deceased entered the military service of the United States, or that his death happened from any of the casualties or consequences mentioned in the proviso attached to the written permission to go south,

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Opinion of the Commission, per LEONARD, C.

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the direction to render a verdict for the plaintiff was erroneous, and the defendant's exception well taken.

The deceased held no office of a military character, and there is no evidence that he was ever enlisted or enrolled as a private. I am not much experienced in military affairs; but it is generally understood that there is a record of the entry of both officers and privates into the military service. There is, clearly, no evidence of this character.

There is some evidence that he, as well as the mechanics and laborers under his superintendence, were at work by the month. That does not indicate military obligation. The fact that he and the others were paid by the military paymaster, proves nothing, on the question whether the deceased was in the military service. Such payment might be so made without having entered that service. His employment was not belligerent. On the contrary, the most decided non-resistant might consistently do the same work. It is urged that the railroads were under a military director, and were used for military purposes exclusively. The roads could not be so used until bridges were constructed; and I am unable to perceive that a civilian might not engage in their construction without losing his standing as a non-combatant. Suppose that the military director of railroads employed the deceased, and that he was subject to his authority while so employed; it does not necessarily follow that he had entered the military service. Entering the military service, within the meaning of the policy, must be taken in its strict or limited sense, as most advantageous to the assured, as well as all other provisions therein. The company frame the policy and choose the language. If there is anything uncertain, it is the right of the assured to enjoy the most favorable rule of construction. The general understanding of the term includes such persons only as are liable to do duty in the field as combatants.

There is no evidence that the widow is entitled to a pension, as would be the case if her husband had perished in the military service of the United States during the rebellion

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Opinion of the Commission, per LEONARD, C.

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There is, in my opinion, an entire absence of any evidence that the deceased was in any military service, according to the meaning of the policy. Did he lose his life by the casualties or consequences of war, rebellion, or from belligerent forces? Certainly there is no evidence that this party of four, who came without any of the insignia of war, armed with revolvers only, and doing nothing for the service of the public or Confederate cause, but confining their operations to robberies for their personal advantage, and to the murder of an unarmed man, not in the dress of a federal soldier, constituted a belligerent force, or any part of such force. The war or rebellion may be a remote cause of the death, as it was the cause of disorder and lawlessness; but the proximate cause is murder and highway robbery.

It would be a very unnatural and forced construction that would relieve the defendants from liability, by holding that the four robbers and assassins who murdered Philip J. Welts, and robbed the mechanics and laborers whose work he was superintending, were acting under the authority of the Confederate States. Had the defendants intended to attach such a meaning, the provision would have been directly for exemption from liability for death by violence. The language used can be considered as including only death from casualties or consequences of war or rebellion, carried on or waged by authority of some *de facto* government, at least. No evidence was produced tending to bring the defendant's case within any such limit.

There were no facts for the consideration of the jury.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

## Statement of case.

JOSEPH CHARLES FISHER, Appellant, v. LOUISE H. HEPBURN,  
impleaded, etc., Respondent.

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118	336
48	41
168	*437

A judgment in an action, where the court rendering it has jurisdiction of the parties and the subject-matter, is final, until, in some of the modes of review known to the law, it has been reversed; the decision of the court ordering the judgment cannot be reviewed upon motion to set it aside.

A party who has appeared and litigated the action cannot move to set aside the judgment, upon the ground that such an action cannot be maintained. If he made no objection to the sufficiency of the complaint, and litigated the cause upon the merits, he would be bound by the judgment. If he raised the objection, it would be the duty of the court to decide it, and if the court erred, the only mode of review known to the law is by appeal from the judgment or a motion for a new trial upon a case or bill of exceptions.

An action to compel the determination of claims to real property is within the jurisdiction of the Supreme Court, and in such action, it is its duty to determine the questions as to whether the plaintiff is entitled to the relief sought, and whether the relief should be sought in an action, or in proceedings under the Revised Statutes. An error in deciding these questions does not affect the question of jurisdiction, and the decision of the court thereon cannot be reviewed collaterally.

A party seeking to compel the determination of claims to real property has the choice of remedies; by action under section 449 of the Code, or by special proceedings under the Revised Statutes. (2 R. S., 313, as amended by subsequent acts.)

Where an action is commenced, a defendant, by appearing and taking part in the proceedings to judgment without objection, will be held to have waived any objections to the regularity of the proceedings, and cannot thereafter object that the proceedings should have conformed to the provisions of the Revised Statutes as amended.

Where there are different claimants, each claiming distinct parcels of the real property in question, but all denying plaintiff's rights upon the same ground, and claiming title from the same source, it is proper to join them as defendants in the same action or proceedings.

The caption to the findings of the justice, before whom an action to determine the title to real property was tried, was as follows: "At a Special Term of the Supreme Court for motions and chambers business, held at chambers, at the City Hall, in the city of New York." It was objected, that the cause was not tried at any term of court, but before a judge out of court. This objection was not taken below.

*Held*, 1st. That such an objection would not be permitted to be raised in

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Statement of case.

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this court for the first time. 2d. That it sufficiently appeared that the cause was tried at a Special Term, held at the place for holding courts in the city of New York, and it would not be assumed that it was not a regular court for the hearing of all Special Term business, in the face of the fact that the parties, without objection, went to trial.

Whether the proceedings to determine the title to real property are by action or special proceedings, the court has jurisdiction over the question of extra allowance of costs, and the decision cannot be set aside upon motion.

An order setting aside a judgment is appealable to this court.

(Argued May 16, 1871; decided September term, 1871.)

APPEAL from order of the General Term of the first judicial district, affirming order of Special Term, vacating judgment in favor of plaintiff.

This action was commenced to compel the determination of claims to certain real property situated in the city of New York. The summons was in the usual form for relief, and was dated in October, 1862. It was soon thereafter served upon all the defendants. One of the defendants resided in California, and the summons was served upon him by publication, and he appeared and answered. All the defendants appeared in the action but one, and all those who appeared served answers except three.

The complaint alleges the ownership, source of title, and possession of the land by the plaintiff, who claimed title in fee as heir-at-law of his father Leonard Fisher, Jr., under the will of his grandfather, and also as heir-at-law of his father, who died intestate; describes the various parcels of land; alleges that the defendants unjustly claim title to said lands in fee; and demands judgment "that the defendants, and all persons claiming under them by title accruing subsequently to the commencement of this action, be forever barred from all claim to any estate of inheritance, or freehold, or for any term of years not less than ten in the said premises." The answers were all substantially alike. The respondent, Louisa H. Hepburn, answered jointly with her brothers, George Fisher, Thomas Fisher and James H. Fisher, and, among



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Statement of case.

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other things, the answer alleges that Leonard Fisher, Jr., the alleged father of plaintiff, was never married and had no children; that he had eight brothers and sisters, of whom the four uniting in the answer were the only survivors, and that the other defendants were the children and heirs-at-law of the four deceased brothers and sisters; that the defendants were the only heirs-at-law of said Leonard Fisher, and upon his death became and were seized in fee simple of said premises, and entitled to the possession thereof, and to the rents, income and profits thereof, as such heirs-at-law; and the four defendants each claimed one undivided eighth part of said lands in fee simple, and demanded judgment for such interest, and that they be put into the possession of said lands, and that the plaintiff be compelled to account to them for their share of the rents and profits of said premises since the death of said Leonard Fisher. The other defendants in their answers claimed different proportions of said lands. The substantial issue in all the answers was upon the legitimacy of the plaintiff.

The plaintiff replied to the several answers, denying the allegations therein contained, and repeating his demand for judgment.

On the 5th of January, 1864, an order was made at Special Term of the Supreme Court, after due notice to all the parties who had appeared, directing a reference to settle the issues, that the defendants have the affirmative of such issues; that the action be placed upon the circuit calendar of the date of the 16th day of January, 1863, for the trial of said issues, both plaintiff and defendants to be at liberty to notice the same for trial, and that the result of said trial be certified to the court and to be used at the trial thereof at Special Term.

The referee thus appointed fixed the 29th day of August, 1865, for the hearing upon the said reference, of which due notice was given to all the parties who appeared, and the attorney for the plaintiff alone appeared upon such hearing. After such hearing, on the 16th day of September, 1865, the

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Statement of case.

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referee made his report that he had settled said issues as follows:

1st. Did Leonard Fisher, Jr., referred to in the complaint, die without ever having been married?

2d. Did said Leonard Fisher, Jr., die without leaving lawful issue him surviving?

3d. Is the plaintiff the son of said Leonard Fisher, Jr., born in lawful wedlock?

4th. Are the defendants in this action, or any or either of them, relations of said Leonard Fisher, Jr.?

5th. What is the relationship existing between said Leonard Fisher, Jr., and the defendants or any of them?

The issues as thus settled, upon due notice to all the defendants who had appeared in the action, were brought to trial at a circuit in March, 1866, and the jury found that the plaintiff was the legitimate son of Leonard Fisher, Jr., and that the defendants were his collateral relatives, and the attorney for the respondent, Mrs. Hepburn, appeared for her upon the said trial and announced himself ready for trial, and participated in the trial.

Thereafter, on the 22d of March, 1866, pursuant to notice, the action was brought to trial before Justice BARNARD, "at a Special Term of the Supreme Court for motions and chambers business, held at chambers, at the City Hall, in the city of New York," as appears by the caption to the findings of the said justice. Upon such trial, the attorney for said respondent again appeared for her, and also for the other defendants; and the said justice found all the facts stated in the complaint to be true as therein alleged, and found and decided as matter of law, that the plaintiff was entitled to judgment against the defendants who had appeared and answered, "adjudging that they, and all persons claiming under them, or any or either of them, by title accruing subsequently to the commencement of this action, be forever barred from all claim to any estate of inheritance or freehold, or for any term of years not less than ten, in the said premises, and every part thereof, besides the costs and expenses

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Statement of case.

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of this action." And it appearing that the value of the real estate was \$103,000, the said justice made a further allowance to the plaintiff of five per cent upon the amount.

The motion for the extra allowance was made at the close of the trial and was opposed by the counsel for the respondent, and after argument was granted by the said justice. Notice for the adjustment of the costs was served for the 24th of March, and on said day the costs were adjusted, the extra allowance being included therein, and on that day judgment was duly entered in pursuance of the said decision and for the said costs under the direction of the said justice. The caption to the said judgment is as follows: "At a Special Term of the Supreme Court for motions and chambers business, held at chambers, at the City Hall, in the city of New York, on the 24th day of March, A. D. 1866. Present—Hon. George G. Barnard, justice." On the same day plaintiff's attorney gave notice of the entry of judgment to all the attorneys who had appeared in the action, and thereafter, on the 1st day of June, after the time for appealing had elapsed, the said Louisa H. Hepburn served a notice of appeal from the said judgment, but said notice was treated as a nullity because the same was too late, and was subsequently by consent withdrawn.

On the 30th day of May, 1866, B. W. Huntington was substituted as the attorney for the respondent, and on the 5th day of June, 1866, he made an affidavit reciting the facts alleged in the complaint and answers, and the proceedings generally, in the action, and alleging that an execution had been issued upon the judgment for costs and levied upon the property of his client. That he had perfected the appeal, which plaintiff refused to recognize as valid, because it was too late, and stating that it was his opinion, founded upon "the judgment roll and the facts disclosed in this affidavit, that there are substantial grounds for holding that the case is not one in which proceedings to compel the determination of claims to real estate can be had pursuant to the Revised Statutes, and therefore that the judgment is a nullity, or that

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Statement of case.

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the requisitions of the statute have been fatally disregarded, or that the court did not have power to make the extra allowance of five per cent on the value of the real estate, or that there should have been several judgments against the defendants, according to their respective claims, or that such allowance, if authorized by law, should have been apportioned against the several defendants according to the extent of their several claims; and that the judgment ought, on motion, to be vacated as a nullity, or that the same ought to be modified as herein alternatively set forth."

Upon this affidavit, said attorney procured from Mr. Justice INGRAHAM, at Special Term, on the 6th of June, 1866, the following order to show cause:

"On the judgment roll and adjustment of costs in the above entitled action, and on reading and filing the affidavit of B. W. Huntington, on motion of the said B. W. Huntington, of counsel for Louisa H. Hepburn, one of the above named defendants, it is ordered,

1. That the plaintiff show cause, at a Special Term of this court, to be held at the City Hall, in the city of New York, on the third Monday of June, 1866, at 12 o'clock, noon, why the judgment entered in the above entitled action should not be vacated as a nullity, upon the ground that the case, as set forth in and by said judgment roll, is not one in which proceedings to compel the determination of claims to real estate are authorized by the Revised Statutes, or upon the ground that the provisions of the Revised Statutes, and the amendments thereto, in regard to the conduct of said proceedings, have been fatally disregarded; or why the said judgment should not be vacated as aforesaid, as to so much thereof as adjudges, that the plaintiff recover of the defendants an allowance of five per cent on the value of the real estate claimed in the action, upon the ground that the court did not have power to make such allowance, or any additional allowance, except the allowance by section 308 of the Code of Procedure; or why the said judgment should not be amended by severing the same into several judgments against the several

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Statement of case.

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claimants, defendants, according to their respective claims, and apportioning the allowance of five per cent, if authorized by law, to the respective values of the parts of the real estate claimed respectively by the said several claimants defendants, so as that judgment should be against each for five per cent of the value of the part claimed by each; and why the said defendant should not be permitted to discontinue the appeal to the General Term, taken in this action, on such terms as may be just; and why the said defendant should not have such other or further relief as may be just, with costs of motion.

2. And the said defendant, Louisa H. Hepburn, having given security, as required by law, it is further ordered that all proceedings on the part of the plaintiff, under the aforesaid judgment, be stayed until the further order of this court."

The said order to show cause came on to be heard before the said justice, at Special Term, July 14, 1866, and upon said hearing, the attorney for the plaintiff read an opposing affidavit, reciting, among other things, how the respondent had had notice of the various proceedings in the cause, and how she had appeared therein, and alleging that the motion for an extra allowance was first made at the Circuit held by Mr. Justice JAMES, at the trial of the issues, and that it was there opposed by respondent's attorney, and that the justice then stated that, if the motion was properly before him, he would allow the largest amount which the law would permit, but that the motion ought to be made upon the trial at the Special Term; and the court made the following order:

"The order to show cause, heretofore granted in the above entitled action, this day coming on to be heard, and it appearing from the judgment roll that the case as set forth in and by the said judgment roll is not one in which proceedings to compel the determination of claims to real estate are authorized by the Revised Statutes; and it further appearing from the judgment roll that the provisions of the Revised Statutes and

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Statement of case.

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the amendments thereto, in regard to the conduct of proceedings to compel the determination of claims to real estate, have not been pursued so as to give this court jurisdiction to compel the determination of the claims to real estate set up in the answers, or either of them, or of any claim to real estate; and it further appearing from the said judgment roll that this court did not have jurisdiction to render the judgment in said judgment roll contained; and it further appearing, from said judgment roll, that this court did not have jurisdiction to make the further allowance of five per cent in said judgment allowed, or to give judgment therefor:

Now, on the said judgment roll, and on the adjustment of costs in the aforesaid action, and on reading and filing the order to show cause in this behalf, and the affidavit of B. W. Huntington thereto annexed, and the affidavit of Thomas Darlington, Esq., and exhibits thereto annexed, read upon the hearing of this motion, after hearing B. W. Huntington, of counsel for the defendant, Louisa H. Hepburn, for the motion, and Thomas Darlington, Esq., of counsel for the plaintiff, opposed, and due consideration thereupon had, on motion of the said B. W. Huntington it is ordered and adjudged, that the judgment heretofore rendered in the above entitled action, and appearing in said judgment roll as the final judgment in said action, whereby it is adjudged, among other things, that the defendant, Louisa H. Hepburn, and the other defendants who made answer in said action, and all persons claiming under them by title subsequent to November 10th, 1862, are forever barred from all claim to an estate of inheritance, or freehold, or for any term of years not less than ten, in the premises in said judgment described, and every part thereof, and that the plaintiff recover of the said defendants the sum of \$5,442.99, which judgment appears by the said judgment roll to have been rendered on the 24th day of March, 1866, be, and the same is, together with the entry thereof in the judgment book of the clerk of this court, and every part thereof, hereby vacated and annulled, as to the said Louisa H. Hepburn, and that the execution which has been issued and

## Statement of case.

levied under and for the satisfaction of the said judgment, and the levy of said execution, be and the same hereby are vacated and quashed as to the said Louisa H. Hepburn; and it is further ordered and adjudged that the defendant, Louisa H. Hepburn, pay to the plaintiff ten dollars costs of this motion and the costs of trial of the said action at the Special Term at which the trial was had; and it is further ordered and adjudged that the evidence taken in said action and the findings of the jury on the issues, stand, and that the said cause be brought on for hearing at the next Special Term of this court, in October, unless the plaintiff, within ten days from the service of this order, serve a consent that the defendant, Louisa H. Hepburn, may appeal with stay of proceedings and a proper undertaking within twenty days from service of such consent, and that proceedings under said judgment be stayed until such appeal is perfected or such twenty days have expired, and thereupon this motion is denied, with ten dollars costs to be paid by said Louisa H. Hepburn to the plaintiff; otherwise this motion is to stand as granted upon the terms above mentioned."

From this order the plaintiff appealed to the General Term, and from affirmance there to this court.

*H. E. Davies* for appellant. The judgment of a court having jurisdiction cannot be attacked collaterally or reviewed except by appeal. (*Le Guen v. Gouverneur*, 1 Johns. Cas., 492; *Embury v. Conner*, 3 Comst., 511, 522; *Wesson v. Chamberlain*, id., 331; *Wilcox v. Jackson*, 13 Pet., 511; *People v. Sturtevant*, 9 N. Y., 263.) The court had jurisdiction of the subject-matter. (*People v. Sturtevant*, 9 N. Y., 263; *In re Canal and Walker Streets*, 2 Kern., 406; *Bangs v. Duckenfield*, 18 N. Y., 592.) No objections could be considered by the justice at Special Term, except those disclosed in the order to show cause. (*Coit v. Laimbeer*, 2 Code R., 79; *Harder v. Harder*, 26 Barb., 409; *Rocho v. Ward*, 7 How., 416; *Boyd v. Weeks*, 6 Hill, 71; Rule 39, Supreme Court.) Proceedings by action to compel determination of

## Statement of case.

claims to real estate are proper. (Code, § 449; *Hammond v. Tillotson*, 18 Barb., 332; *Mann v. Provost*, 3 Abb., 446; *Peck v. Brown*, 26 How., 350; *St. John v. Pierce*, 22 Barb., 362.) Aside from the Code, proceedings to determine claims to real estate might properly be had against those claiming separate shares. (5 Edm. Stat., 437; 4 Kent's Com., 10th ed., 551; *Jackson v. Bradt*, 2 Caines, 169; *Malcolm v. Rogers*, 5 Cow., 188; R. S., part 3, tit. 7, chap. 5, § 11; *Tillinghast's Adm'rs*, 209; *Courtney v. Shropshire*, 3 Settle's Ky., 265; *Doe v. Potts*, 1 Hawk., 469; *Porter v. Bleiler*, 17 Barb., 154; 12 Wend., 258.) It is now in practice to bring in all parties interested. (*St. John v. Pierce*, 22 Barb., 362, 369; Code, § 274.) The propriety of the extra allowance cannot be inquired into after judgment. (*Dresser v. Jennings*, 3 Abb., 240; *Ryle v. Harrington*, 4 id., 421; *Jackson v. Fassit*, 17 How., 453; *Nesmith v. Clinton Ins. Co.*, 8 Abb., 141.)

*B. W. Huntington* for respondent. The order is not appealable. (*Humphrey v. Chamberlain*, 11 N. Y., 274; *Folger v. Fitzhugh*, 41 id., 228, 231; *B. and A. R. R. Co. v. Johnson*, 42 id., 215; *Tabor v. Gardner*, 41 id., 232; *Church v. Rhodes*, 6 How., 281; *McColter v. Hooker*, 8 N. Y., 503.) Judgment could only be rendered by the court sitting as such. (*Clark v. East India Co.*, 2 Bail. Ct. R., 320; *Bangs v. Selden*, 13 How., 376; *Aymer v. Chase*, 12 Barb., 301.) Section 449 of Code is repealed, and the remedy only by provision of statute. (Laws of 1855, chap. 511; *Crane v. Sawyer*, 5 How., 372; *McKeon v. Caherty*, 3 Wend., 494; *Almy v. Harris*, 5 Johns., 175; *People v. Hazard*, 4 Hill, 207; *Renwick v. Morris*, 7 id., 575; *Pennington v. Townsend*, 7 Wend., 276; *Cook v. Kelley*, 12 Abb., 35; S. C., 14 id., 466; *Gould v. Town of Sterling*, 23 N. Y., 456; *Dudley v. Mayhew*, 3 id., 9; *Smith v. Lockwood*, 13 Barb., 209; *Durle v. Van Kleeck*, 7 Johns., 477, 497; *Dexter and Limerick P. R. Co. v. Allen*, 16 Barb., 15; *Goddard v. City of Boston*, 20 Pick., 467.)



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Opinion of the Commission, per EARL, C.

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EARL, C. At the Special Term, Mr. Justice INGRAHAM wrote a brief opinion, which seems to have been adopted by the majority of the court at General Term, in which he said: "I think it very doubtful whether any such action can be maintained as was brought in this case. The only proceeding for such a purpose is under the Revised Statutes, and not an action; and the proceeding can only be to compel a determination upon a claim which any other person may make to an estate, and not against persons claiming distinct parcels of the estate, so as to include all in one judgment. In the complaint, the interest claimed by the defendants is not stated, but, by the answers, it appears some claim one-eighth; some, one-sixteenth; some, one-thirty-second, and some one-ninety-sixth. No judgment can be properly rendered against them jointly. If this is not to be regarded as an action, there can be no allowance." It is thus seen upon what ground the order was granted.

This action was commenced in the Supreme Court; a court of general jurisdiction in law and equity. The respondent was properly served and brought into court, and she appeared and answered, and defended the cause in all its stages. She made no objection to the jurisdiction of the court, and took no exception to any of its rulings, and judgment, in the ordinary form, was rendered against her. She did not appeal from the judgment, but seeks to attack it collaterally, by motion to set it aside. Can the decision of the court ordering this judgment be reviewed in this way? Suppose there had been no statute authorizing an action or special proceeding to determine the conflicting claims to real estate, and the plaintiff had commenced this action in equity, alleging his title, possession, etc., and that the defendants unjustly claimed title to the real estate, and praying that his title might be established and quieted, and the conflicting claims determined; and suppose the defendants had answered and defended as they have in this case: the court having jurisdiction of the parties, one of the questions for it to determine would be whether such an action could be maintained. If the

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Opinion of the Commission, per EARL, C.

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defendants made no objection to the sufficiency of the complaint, and litigated the cause upon the merits, could there be any doubt that they would be bound by the judgment pronounced? But suppose they did raise objections, it would be the duty of the court to decide such objections, and if the court erred, the only mode of review known to the law would be by appeal from the judgment, or a motion for a new trial, upon a case or bill of exceptions.

But we have statutes upon the subject, conferring upon the Supreme Court jurisdiction to determine the conflicting claims to real estate, and it seems to be somewhat controverted whether the proceeding should be a special one under the Revised Statutes or an action under the Code. In this case an action was resorted to, and it was one of the questions for the court to decide, whether the action was proper, and that decision according to every rule of law applicable to such cases must be final, until, according to some of the modes of review known to the law, it has been reversed. This would be so, even if the defendants had in some form objected to the plaintiff's right to maintain the action. But can they waive all objection and substantially admit that the form of the remedy is right, and then, after final judgment, complain that the judgment is a substantial nullity, pronounced without jurisdiction and therefore void? In *Wilcox v. Jackson* (13 Peters, 511), it is said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision is correct or otherwise, its judgment, until reversed, is regarded as binding in every other court." In *The State of Rhode Island v. The State of Massachusetts* (12 Peters, 718), Mr. Justice BALDWIN, delivering the opinion of the court, says: "Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit; to adjudicate or exercise any judicial power over them; the question is whether, in the case before a court, their action is judicial or extra-judicial; with or without authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the

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Opinion of the Commission, per EARL, C.

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power to render a judgment or decree, then the court has jurisdiction. What shall be adjudged or decreed between the parties, and with which the right of the case, is judicial action, by hearing and determining it." In *People v. Sturtevant* (9 N. Y., 263), Judge JOHNSON says: "Jurisdiction does not relate to the rights of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced, nor the right of the plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity either in the plaintiff or in any one else. The case we are considering illustrates the distinction I am endeavoring to point out as well as any supposed case would. It presents these questions: Have the plaintiffs shown a right to the relief which they seek? And has the court authority to determine whether or not they have shown such a right? A wrong determination of the question first stated is error, but can be re-examined only on appeal. The other question is the question of jurisdiction. (See also, *In the Matter of Canal and Walker Streets*, 2 Kernan, 406; *Bangs v. Duckinfield*, 18 N. Y., 592.) Within these principles, so ably stated by the learned judges, can there be any doubt that the court had jurisdiction of this case? It had jurisdiction of the persons of the defendants by the service of process in the ordinary way, and it was its duty to determine whether the action could be maintained and the relief claimed could be granted. And even if these questions were erroneously determined, it does not affect the question of jurisdiction, and the error must be corrected by some one of the regular modes of review provided by law.

It would be a very unwise administration of justice and lead to much vexatious litigation if a judge holding one Special Term could, upon mere motion, set aside the decision and judgment of another judge at Special Term upon allegations that the latter had erred as to any of the questions submitted

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Opinion of the Commission, per EARL, C.

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for his determination. Here there is no allegation of any mistake that has caused wrong to the defendants, or that there was any collusion between the attorneys, or that the case was not properly defended by the respondent's attorney. It is simply a case where one judge differs as to the law from another judge who tried the case. Without going further, there would be abundant reason for reversing the order appealed from. But I am clearly of the opinion that the court did not err in entertaining the action and rendering the judgment.

The Revised Statutes (2 R. S., 312) provide a special proceeding for the determination of claims to real estate. The proceeding has many of the incidents of an action, particularly as amended by chap. 511 of the Laws of 1855. But the Code, section 449, provides as follows: "Proceedings to compel the determination of claims to real property, pursuant to the provisions of the Revised Statutes, may be prosecuted by action under this act without regard to the forms of the proceedings as they are prescribed by that statute." This section was permissive, and gave a party a choice of remedies by action under the Code, and by special proceedings under the Revised Statutes. The Revised Statutes provided a remedy by special proceedings to settle conflicting claims to real estate. The Code provides that the same relief may be sought by action without reference to the forms provided in the Revised Statutes. The relief is to be sought by the ordinary proceedings of an action. This was so held in *Hammond v. Tillotson* (18 Barb., 332); *Mann v. Provost* (3 Abb., 446); *Peck v. Brown* (26 How., 350); *Burnham v. Onderdonk* (41 N. Y., 425). But if it should be held that the action under the Code is required to conform to the provisions of the Revised Statutes, as amended in 1855, then the respondent, by appearing and taking part in the proceedings in all their stages from the commencement to final judgment, without making any objection, must be held to have waived any objections to any irregularities in the proceedings which they might otherwise have made.

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Opinion of the Commission, per EARL, C.

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It is claimed, on the part of the respondent, that the plaintiff could not properly unite all the claimants as defendants in the action. I cannot doubt that this claim is entirely unfounded. Here are twenty-four persons claiming title to this real estate. They all denied plaintiff's right upon the same ground, and claimed title from the same source, and, therefore, had the same defence to the action. It cannot be that, under the Revised Statutes, it would have been necessary for the plaintiff to have instituted, in such a case, twenty-four special proceedings. There is nothing in the letter or the object of the law which would require this, and the proceeding could be conducted against several as well as one. Under the Revised Statutes, these defendants, if they had all been in possession of this real estate, claiming the same title which they set up as defendants, in this action, could all have been united as defendants in an action of ejectment; and they could, if they had chosen to do so, all have united in an action of ejectment against the plaintiff. Hence, there was no error in the joinder of the defendants. But if there was, it was waived by the omission to raise the objection in the answer or upon the trial. (*Fosgate v. The Herkimer Manufacturing and Hydraulic Co.*, 12 N. Y., 580.)

It is also objected, that it appears, by the caption to the findings of Mr. Justice BARNARD, and of the judgment, that the action was not tried at any term of court, but before the judge, out of court, at his chambers. This objection was not made in the moving papers, and seems to have been raised for the first time in this court. The order to show cause, and the order setting aside the judgment, both assume and state, in substance, that the action was tried in court. If the objection had been made in the moving papers, it could have been made to appear more clearly, perhaps, that the action was tried in court, and, hence, the objection should not be permitted to be raised here for the first time. But it is sufficient that it appears that the action was tried at a Special Term, held at the City Hall, the place for holding courts in the city of New York. The chambers of the judge may

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Opinion of the Commission, per EARL, C.

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have been in the court-room, and while it is recited that it was a Special Term for motions and chamber business, we cannot assume that there was not a regular court sitting there for the hearing of all Special Term business, in the face of the fact that the parties, without objection, went to trial. It may be that this particular place for holding the court was provided by the sheriff under sections 24 and 28 of the Code, and the Special Term may have been adjourned to the judge's chambers under section 24. Every presumption must be in favor of the regularity of the proceeding in this respect.

The only other objection to be considered is as to the extra allowance. If this was to be treated as an action under the Code, then the court had jurisdiction over the question of extra allowance, as in other actions. If it was to be governed as to costs by the Revised Statutes, then it is provided (§ 7, as amended in 1855) that the court can award costs "as in other personal actions." Mr. Justice BARNARD, at Special Term, then, had jurisdiction to decide the question of extra allowances, and another judge, at Special Term, could not, upon motion, set aside or reverse his decision. And even if the extra allowance was improperly granted, it would not authorize such an order as was made in this case.

The order is clearly appealable under the fourth subdivision of section 11 of the Code, as amended in 1870.

Having thus given the case the careful consideration its importance seems to demand, I have reached the conclusion that the order appealed from should be reversed, and the motion dismissed, with costs.

All concur.

Order reversed and motion denied, with costs in both courts.

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Statement of case.

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ISAAC D. AMSBRY, Appellant, v. ROGER W. HINDS et al.,  
Respondents.

The last clause of section 1 of the "act to amend the Revised Statutes in respect to highways" (Laws of 1861, chap. 811), which provides, that all highways that have ceased to be traveled or used as such for six years, shall cease to be highways for any purpose, is not limited, by the second section of said act, to highways "laid out and dedicated," but applies as well to highways created by twenty years user. Said clause, however, is not retroactive in its effect, but only applies to such highways as have ceased to be traveled or used for six years after the passage of the act. (LEONARD, C., dissenting.)

(Argued May 16, 1871; decided September term, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the sixth judicial district, affirming a judgment for defendants entered upon a verdict. The case is reported below, 46 Barbour, 622. The facts are stated in the opinion.

*G. L. Sessions* for appellant. Effect is to be given to every part of a statute. (Sedgwick on Statutes, 238; 7 Cush., 89; 1 Binney, 601; 5 Hill, 222.) Defendants were bound to prove twenty years continuous user, not merely by a few individuals, but by the public generally. (*Martin v. The People*, 23 Ill., 395, 396.) The ceaser of a use for a less period than twenty years, accompanied by any acts clearly indicative of an intention to abandon the right, is sufficient to extinguish a right of way. (*Reg. v. Chorley*, 12 Jur. [1850], 822; *Ward v. Ward*, Eng. Laws, etc., 413; *Crain v. Fox*, 16 Barb., 184, 187.) By allowing the road to be fenced and plowed up, the public authorities showed a clear intent to abandon. (2 Wash. on R. P., 82, 83, §§ 56, 57; 16 Barb., 187.)

*L. Seymour* for respondents. The statute of 1861 only relates to highways which have been laid out. (*Doughty v. Bull*, 36 Barb., 488; *Tucker v. Rankin*, 15 id., 482; *Thompson on Highways*, 237-241.) The request to charge assumed

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Opinion of the Commission, per LOTT, Ch. C.

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what was not true; and the court, not being able to charge in the language of the request, could for that reason refuse. (*Carpenter v. Stilwell*, 1 Kern., 61-79; *Wright v. Paige*, 3 Keyes, 581, 585, 586; *Le Roy v. The Park Fire Ins. Co.*, 39 N. Y., 56.)

LOTT, Ch. C. This is an action of trespass on land of the plaintiff, and the material question litigated on the trial was, whether the *locus in quo* was a highway. It appears to have been conceded that it had never been laid out under any general law or special statute, but it was claimed that it had become such by twenty years user. There was conflicting evidence on that subject, and the jury, under instructions from the court in relation to it, not excepted to by either party, found a verdict for the defendants, and the only question before this court arises on the refusal of the presiding judge to charge, upon the request of the plaintiff's counsel, "that the road not having been proven to have been worked by the public within six years nor traveled or used as a highway for six years, it is to be deemed abandoned."

This request was based on the provisions of an act of the legislature passed in 1861 (Sess. Laws 1861, chap. 311, p. 709), the first section of which amended section 99 of article 4, title 1, chapter 16 of part 1st of the Revised Statutes (the general highway act) so as to read as follows, viz.: "Every public highway and private road already laid out and dedicated to the use of the public, that shall not have been opened and worked within six years from the time of its being so laid out, and every such highway hereafter to be so laid out, that shall not be opened and worked within the like period, shall cease to be a road for any purpose whatever; but the period during which any suit, mandamus, certiorari or other proceeding shall have been or shall be pending in regard to any such highway, shall form no part of said six years; and all highways that have ceased to be traveled or used as highways for six years, shall cease to be a highway for any purpose." The second section declares that, "the provisions of this act



shall apply to every public highway and private road laid out and dedicated to the use of the public within the last six years and to every such highway hereafter to be laid out," and by the third and only other section the act was to take effect immediately. The request was properly refused.

1st. It assumed that there was no proof that the road had been traveled or used as a highway for six years. This assumption was unauthorized. The appellant's counsel concedes that it was shown to have been used as early as 1831. Its use was continued till 1844. From that time it ceased to be used till in 1855. There was evidence tending to prove, and it was sufficient to justify the jury in finding the fact, that its use was then resumed, and that the travel and use had been continuous for two years before the trial, which took place in September, 1865. The act complained of as a trespass is alleged in the complaint to have been committed in April of the same year. This brief reference to the facts shows that the statement in the request, "the road not having been proven \* \* \* to have been traveled or used as a highway for six years," was unwarranted, and the court for that reason properly refused to instruct the jury, on the basis of such erroneous statement, that the road was abandoned.

2d. The act of 1861 is not applicable to this case. I, however, do not concur in the opinion of the majority of the court below, that the second section thereof, by its terms, *limits* the application of *all* the provisions of the act to public highways and private roads laid out and dedicated to the use of the public, and that an exclusion of highways by user from its operation is therefore implied. The last clause of the first section applies to "*all* highways that have ceased to be traveled or used," etc., while the previous provisions relate only to public highways and private roads *already laid out*, and dedicated to the use of the public, and to such highways thereafter to *be laid out*. This difference or distinction is significant. When the act under consideration was passed, the general law regulating highways recognized the existence of public highways acquired by user for twenty

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Opinion of the Commission, per LOTT, Ch. C.

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years, as well as those that had been "laid out and allowed under any law of this State." (1 Rev. Stat., p. 521, § 100.) The last clause of the first section was a new enactment, and is sufficiently comprehensive to include both classes of highways; and it appears to me clear that it is not, and was not intended to be, limited to the highways mentioned in the first clause. If such had been the intention it would have been expressed by the use of the terms *all such* highways, as was done in making the latter part of the first clause applicable to those, and in the exception of the period during which a suit, mandamus, certiorari, or other proceeding had been or should be pending "in regard" to them. It is not necessary to give a construction to the second section of the act. It is sufficient to say that it does not in terms declare that it shall *only* apply to the highways and private roads therein designated, and that such a limitation or restriction is not necessary to give it effect. The views already expressed lead me to the conclusion that the last clause of the first section includes public highways by user.

Assuming such construction to be correct, it remains to be considered whether the clause applies to the road in question. It is claimed in behalf of the appellant, that "by the true reading, this cessation of travel or use, for six years, was made, at the time of the passage of the act, to relate entirely to the past," and that "by no rules of construction can it be made to have any future or prospective application."

I cannot assent to those propositions. Every law is, as a general rule, to be so construed as to operate prospectively, and unless the legislative intent, that it shall act retrospectively, is expressed in clear and unambiguous language, such a construction must be given to it. Broom, in his "Legal Maxims" (4th edition, page 28, marginal paging p. 36) says it is, "in general, true, that a statute shall not be so construed as to operate retrospectively, or take away a vested right, unless it contains an enumeration of the cases in which it is to have such operation, or words which can have no meaning, unless such a construction is adopted." Upon the

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Opinion of the Commission, per LOTT, Ch. C.

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application of that rule to the clause in question, it is prospective in its effect. The words, "*have ceased* to be traveled and used," do not, necessarily, relate to the past. It may and should be construed, as declaring that all highways that have ceased to be traveled or used for six years (after the passage of this act) shall cease to be a highway for any purpose. It would be an unreasonable construction of the clause to hold that it was the intention of the legislature to discontinue, immediately on the passage of the act, all highways that had, at any time, for six years previous thereto, ceased to be traveled or used, and yet make no provision for such cessation or non-user in the future. It cannot relate both to the past and future. And it is more consistent with the object of a statute to treat it as prescribing a rule for future action, than at once to deprive the public of a right and privilege they were entitled to, but which they had omitted for a short period to exercise, without giving them any opportunity to resume its enjoyment. The construction I have given to the provision is in harmony with a decision of the Supreme Court in the case of *Bailey v. The Mayor, etc., of New York* (7 Hill, 146), in which the meaning of the third section of chapter 324 of the Laws of 1844 came in question. That act was passed on 7th of May of that year, and it took effect immediately. The section was in the following terms: "It shall be lawful for a party to a suit, who shall have obtained a verdict, on a report of a referee, in his favor, to tax interest upon the amount of such verdict or report, as costs, from the time of obtaining the same to the time of perfecting judgment thereon."

The verdict, in that case, was recovered in June, 1843, but judgment thereon was not perfected till the third day of June, 1844, and the taxing officer taxed the interest, as costs, from the time of the recovery of the verdict until the time of the entry of judgment. It was claimed, by the plaintiff's counsel, on opposing a motion by the defendant for the retaxation of the costs, that the interest was chargeable under the said section, but NELSON, J., said: "As the verdict in the present

## Statement of case.

case was rendered before the act of 1844 was passed, the charge for interest should have been disallowed. Notwithstanding the peculiar phraseology of the section, relied on by plaintiff's counsel, we think it ought not to be so construed as to give it retroactive effect." The same construction was given to the section, in *Bull v. Ketchum* (2 Denio, 188), by BRONSON, J., who said: "The statute does not retroact." I will add, in support of the views above expressed, the case of *The People v. The Supervisors of Columbia County* (43 N. Y., 130).

Without a further consideration of the question, I am, on the grounds and for the reasons already stated, brought to the conclusion that the judgment appealed from should be affirmed, with costs.

All concur, except LEONARD, C., dissenting.

Judgment affirmed.

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157	180

ROBERT H. KERR et al., Appellants, v. WILLIAM T. BLODGETT et al., Respondents.

An insolvent partnership made an assignment of its property and effects for the benefit of creditors; one of the creditors brought an action in his own behalf, and that of others who should come in and claim the benefit thereof, against the assignees, for an accounting and distribution of the trust fund, in which action an order was entered appointing a referee to take and state the account of the assignees, and to report the amount due such creditors as should come in under the order and seek the benefit of the action, and directing the publication of notices to the creditors to come in and exhibit their demands, which order was complied with, and upon the coming in and confirmation of the report of the referee an order was made for the distribution of the fund, which was fully executed by the assignees.

*Held*, that in the absence of fraud, all the creditors of the assignor were bound by the decree, whether they came in and proved their claims or not, and that a creditor who failed to do this was barred, although he had no notice of the action, and knew nothing of it until after the distribution of the trust fund; also *held*, that it was not the duty of the assignees, having knowledge of the claim of a creditor who did not appear, to produce and prove such claim before the referee.

(Argued May 17th, 1871; decided September term, 1871.)

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Statement of case.

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APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment in favor of defendants, entered upon the decision of the court at Special Term.

This was an action by the plaintiffs as creditors of a limited partnership doing business under the name of John Meads, Jr., against the defendants as assignees of such partnership for an accounting and other relief.

The action was brought to trial at a Special Term held in the city of New York in April, 1864, and the presiding justice found the following facts:

John Meads, Jr., and William Tilden, in September, 1855, formed a special partnership, in pursuance of the statute, the name of the firm being John Meads, Jr. Its place of business was in the city of New York. This firm became insolvent March 2, 1857; made an assignment, executed by John Meads, Jr., for the benefit of its creditors, to the defendants. There was no schedule of the creditors annexed. The defendant Blodgett took measures to ascertain who were the creditors, and made a list of them and the amount of their debts or claims. The plaintiffs were creditors, and of this fact and the amount of their debt or claim Blodgett had notice, and caused their names and the amount of their debt to be inserted in the list. The defendant Meads had access to the papers and the list of debts and creditors, and nature of the claims of the plaintiffs. The defendants proceeded to collect the debts; but having doubts as to all the creditors, and deeming it unsafe to make a distribution of the trust funds without the directions of the court, requested one Dexter Reynolds to become a purchaser of a debt against John Meads, Jr., the limited partnership, and to institute an action against the assignees, to compel them to account to and distribute the trust funds. Such action was commenced in this court in June, 1859, in the county of Albany, in which the defendant Meads resided. The defendant Blodgett resided in the city of New York. An order was entered at a Special Term, held in Albany, June 28, 1859, appointing James Edwards a

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Statement of case.

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referee, to take and state the accounts of the defendants, and to report the amount due to the plaintiff, and to each of the other creditors, respectively, of the limited partnership of John Meads, Jr., who should come in under the order and seek the benefit of the action, and directing that the referee should cause advertisement for such creditors to come in and exhibit their demands before him by a day to be fixed for that purpose, to be published once in each week, for at least three weeks, in the State paper, and in a newspaper in the county of Albany, and also in one printed in the city of New York.

The referee caused notice to be published, as directed in the order, in which the creditors were required to come in and exhibit their respective demands on or before the 26th day of July, 1859, or that they would be excluded from the benefit of the order and from any distributive share of the funds in the hands of the assignees. The referee made his report, dated October 26, 1859. Most of the creditors came in and exhibited their demands. An order was made at the Special Term, October 26, 1859, confirming the report and giving directions for the sale of certain assets and for the distribution of the trust funds. This order was fully executed before the commencement of the action.

The action by Reynolds was in his own behalf, as well as in behalf of all others similarly situated who should come in and claim the benefit thereof.

The plaintiffs in this action resided in New York, where John Meads, Jr., had been in business and had failed. They did not come in under the order and exhibit their demands. They had no notice of the action and proceedings by Reynolds against the assignees other than the notice published in the newspapers by Reynolds, and they never saw or heard of this notice, and knew nothing of it until after the distribution of the trust funds had been made. No distribution was made to them or on account of their demands. The defendants did not present such demands to the referee or call his attention in any way to them. It is further found that there was no collusion by the defendants with Reynolds, or any of the cre-

## Statement of case.

ditors in the bringing of or in connection with the action brought by Reynolds against them, nor were the defendants guilty of any actual fraud, or intended fraud, upon the rights of the plaintiffs in that action. The defendants intended to act fairly and to execute faithfully the trust they had assumed. They were under the impression that they had no duties to perform other than to obey and execute the orders of this court in the action brought by Reynolds against them, and they did obey and execute such orders.

The plaintiffs in this action recovered judgments against John Meads, Jr., the limited partnership, July 5, 1859, one for the sum of \$494.85, the other for the sum of \$298.36, and executions were issued upon such judgments and returned unsatisfied. And the said justice decided, as a conclusion of law, that the action by Dexter Reynolds in behalf of himself and other creditors against the defendants, and the proceedings and judgment therein, constituted a defence in this action, and that the plaintiffs herein had established no cause of action against the defendants, and that the complaint be dismissed with costs. The other facts, so far as important, appear in the opinion.

*D. McMahon* for appellants. The creditors were equally entitled to share in the assets. (2 R. S., 4th ed., 175, 176, §§ 20, 21; *Jackson v. Sheldon*, 9 Abb., 127.) The assignees were bound to account to plaintiffs for their proportionate share, unless protected by some legal proceeding. (*Mills v. Argall*, 6 Paige, 577; *Russell v. Lasher*, 4 Barb., 232; *Bell v. Holford*, 1 Dner, 58; S. P. held in *Sheldon v. Smith*, 28 Barb., 593; *Shepherd v. McEvers*, 4 Johns. Ch., 136; *Cruiger v. Halliday*, 11 Paige, 314.) It was the duty of the assignees to have asserted the rights of the plaintiffs. (*Hawkins v. Hawkins*, 23 Exch., 543; *Powell v. Wright*, 29 id., 744; *Wood v. Burham*, 6 Paige, 513; *Berrian v. McLean*, 1 Hoff. Ch., 435; *Bruck v. Pennybacker*, 4 Leigh, 5; *Johnson v. Candage*, 31 Maine, 28; *Pingree v. Comstock*, 18 Pick., 46; *Griffin v. Macauley*, 7 Grat., 476.) An assignee cannot

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Opinion of the Commission, per EARL, C.

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be discharged, save by consent of all parties interested. (*Shepherd v. McEvers*, 4 Johns. Ch., 36; *Cruger v. Halliday*, 11 Paige, 314; *Niles v. Everham*, 31 Eng. L. & Eq., 237; *Bell v. Holford*, 1 Duer, 58.) A trustee cannot act for his own benefit in a contract on the subject of the trust. (*Green v. Winter*, 1 Ch., 29; *Van Horn v. Ford*, 6 Johns. Ch., 388; S. P. in *Duffy v. Dunan*, 32 Barb., 587; *Cumberland Coal Co. v. Sherman*, 30 id., 553.)

*John H. Reynolds* for respondents. The decree in the Reynolds suit, authorizing the creditors to come in and prove their demands, operated as an interlocutory judgment in favor of each and every creditor, and binds each creditor. (*Thompson v. Brown*, 4 Johns. Ch., 619; *Brooks v. Gibbons*, 4 Paige, 374; *Wilder v. Keeler*, 3 id., 164; *Egberts v. Wood*, 3 id., 518; *Innes v. Lansing*, 7 id., 583; *McKenzie v. L'Amoureux*, 11 Barb., 516; Story's Eq. Jur., 530, § 549; Code of Procedure, § 119; Van Santvoord's Eq. Pr., 77, 78; *Gilpin v. Lady Southampton*, 18 Ves., Jr., 469.) Plaintiffs' remedy, if any, was to apply to be let in and prove their demands in the Reynolds suit. (*Brooks v. Gibbons*, 4 Paige, 374.)

EARL, C. The suit instituted by Dexter Reynolds, as well in his own behalf as in behalf of all other creditors similarly situated, was commenced and conducted to its termination according to the practice of courts of equity. In such cases it is many times impracticable to make all the persons who are interested in the fund parties to the suit. They may be unknown, or they may be so numerous that they cannot, with reasonable expense and diligence, be reached. Hence, suits of this kind have been sanctioned as indispensable to the distribution of trust funds and the settlement of trust estates in courts of equity. (*Thompson v. Brown*, 4 Johns. Ch., 619; *Wilder v. Keeler*, 3 Paige, 164; *Egberts v. Wood*, 3 id., 518; *Brooks v. Gibbons*, 4 id., 374; 1 Story's Eq. Jur., § 549.) And the practice is continued under the Code. (Code, § 119; *McKenzie v. L'Amoureux*, 11 Barb., 516; Van Santvoord's Eq. Pr., 77, 78.)



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Opinion of the Commission, per EARL, C.

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In such a suit, when an order or decree for an accounting is once made, under which all creditors are authorized to come in and present their demands, it operates as an interlocutory judgment, in favor of each and every creditor of the fund, whether he actually comes in or not, as effectually as if he had been named and had appeared as a party; and after such an order is made, no other creditor will be allowed to bring or to proceed with a separate suit for relief, but he must prove his claim and seek his relief in that suit.

If he fails to come in and prove his claim, before the final decree for distribution, he will be too late, and his claim will be barred, as it certainly would after the fund was distributed under the decree. After the decree, and before distribution, a creditor who has not proved his claim may, upon a satisfactory excuse for his default, apply to the court, in that action, to be let in, and the court may open his default, as in other cases, upon such terms as may be proper.

It is not disputed that the proceedings in the Reynolds suit were conducted, in all its stages, according to the practice sanctioned by courts of equity, and, hence, the judgment in that suit is binding upon the plaintiffs, just as if they had been parties to it, and their claim had been denied and defeated, unless they can assail or attack it for fraud, and claim its absolute nullity as to them on that account. If the defendants instituted and carried through that action for a fraudulent purpose, the judgment therein should not protect them. They should then occupy the same position as if they had paid the fund, excluding the plaintiffs, without the direction of the court. But the difficulty which the plaintiffs have to encounter is that the court has found that the defendants were not guilty of any fraud in that action, and, so far as I can perceive, no fraud is to be imputed to them from the facts found.

It is true that they procured a claim to be assigned to Dexter Reynolds, and procured him to institute the suit, and that one of them aided him in drawing some of the papers and conducting some of the proceedings in the cause. But all

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Opinion of the Commission, per EARL, C.

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this works no harm to these plaintiffs. The question is, were the proceedings fairly conducted? Were the defendants guilty of any fraud in that suit, and did they do anything therein or in reference thereto to mislead or defraud these plaintiffs? So long as they did not, it made no difference that they procured a friendly creditor to commence the suit. Whether the creditor was friendly or hostile to them, the plaintiffs had the same rights, and could have the same advantages and privileges in the suit. (*Gilpin v. Lady Southampton*, 18 Vesey, 469.)

But the important question, and the one upon which the plaintiffs' counsel seems most to rely, is whether the defendants ought to have represented and proved the plaintiffs' claims before the referee in that action. They had knowledge of these claims, and omitted to produce or prove them before the referee. And the plaintiffs claim that they were guilty of a breach of trust for this omission of duty. We are cited to no decision imposing this duty upon the trustees. Here there was no haste in the proceedings; nothing was done to conceal them from the plaintiffs. The trustees gave all the notice the law required. The fund was under the control of the court, and the court was administering it and ordered that notice should be given to the creditors. The trustees had the right to suppose that the notice given had reached the plaintiffs, and that for some reason, perhaps because they desired to attack the assignment and not recognize its validity, they did not desire to prove their claims. A creditor's suit in such a case is instituted, not only for the benefit of the creditors, but also for the protection of the trustees, and so long as they follow the directions of the court in the suit, and do nothing to mislead or defraud any one, they must be fully protected. They have no active duty to present and establish claims of creditors. Suppose they should present a claim, and the plaintiffs or some other creditor should dispute it, would they be obliged to incur the expenses of establishing the claim? Clearly not. I conclude, therefore, that no fraud or breach of trust can be imputed to the

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Opinion of the Commission, per LEONARD, C.

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defendants for not presenting and proving plaintiffs' claims before the referee.

It may be that the claims assigned to the father and sister of the assignor, which cost less than the dividend, were purchased and assigned under such circumstances that they were not entitled to draw from the fund more than they cost. But that question should have been presented to the referee, and is of no importance to the plaintiffs who, by their default, were shut off from any dividend.

I have looked carefully at the exceptions taken by the plaintiffs during the trial, and find none of them well founded. And I reach the conclusion that the judgment should be affirmed with costs.

LEONARD, C. The question of fraud is the only material one in the case. That inquiry was one of fact, and the judge has found, against the plaintiffs, that there was no fraud or collusion by the defendants in respect to the judgment which they have sought to review. The judgment in the action of Reynolds against Blodgett and Meads is conclusive against these plaintiffs, unless they were able to show some fraud or misconduct on the part of these defendants in suffering the judgment. It cannot be collaterally assailed or inquired into.

There appears to have been good cause for such an inquiry as was set on foot in that action. The special partnership being carried on in the name of John Meads, Jr., the general partner, it was not possible to know, with certainty, whether those who claimed against the fund were his private creditors, or those of the special partnership. For the purpose of obtaining a judicial inquiry as to the true and proper claimants, the action brought by Dexter Reynolds was proper, although set on foot by the defendants. The remote suggestion of benefit to be derived by the defendant Meads, by excluding the two small demands of these plaintiffs, together amounting to about \$800, is too trifling to be considered. As against the defendant Blodgett, the objection is more insignificant. These plaintiffs suggest no valid defence which

## Statement of case.

Blodgett and Meads ought to have interposed to the action of Reynolds against them. The fact, that there was no fraud or evil intention on the part of these defendants as against these plaintiffs, includes every demand to find facts or conclusions of law made by the plaintiffs' counsel, and not specifically passed upon by the judge. The authorities in support of the action of Reynolds, and the practice adopted, are well established, and in frequent use, and it is unnecessary to repeat them here.

The questions as to the exclusion of evidence, offered by the plaintiffs, appear to me untenable.

The judgment should be affirmed, with costs.

All concur, except HUNT, C., not voting.

Judgment affirmed.

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THE PEOPLE ex rel. THE BUFFALO AND STATE LINE RAILROAD COMPANY, Appellants, v. PETER BARKER et al., Assessors of the Town of Evans, and EDMUND Z. SOUTHWICK, Supervisor, Respondents.

SAME APPELLANTS v. PETER FREDERICKS et al., Assessors of the Town of Hamburg, and GEORGE PIERCE, Supervisor, Respondents.

Since the act of 1851 (Laws of 1851, chap. 176), assessors are not bound by the affidavit presented by an owner of property taxed, upon complaint in relation to the assessment thereof. The affidavit is no longer conclusive, but is evidence to be considered by them, with other means of information in their power, and upon the whole their own judgment is to be formed as to the value of the property.

In assessing the real estate of a railroad corporation, assessors are not required to assess it as an isolated piece of land, but each piece of property is to be estimated in connection with its position, its incidents, and the business and profits to be derived therefrom.

The real estate of railroad corporations, occupied and used by them for railroad purposes, cannot properly be assessed as "non-resident lands." The provisions of the Revised Statutes for the assessment of taxes upon incorporated companies (1 R. S., 414, *et seq.*) furnish a sufficient basis for

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## Statement of case.

the assessment and taxation of the lands of railroad corporations, in those towns and counties remote from its principal place of business.

The assessors in those towns are not required to make the entries upon their roll required for the purpose of fixing a basis of a tax upon the capital of the corporation. (Sub. 1 and 2, § 6, 1 R. S., 415.) Those directions are appropriate to the assessors of the town or ward where the principal place of business is located, upon whom the duty of assessing the capital is devolved. Where the duty is not devolved the directions are not applicable. *Held* also, that within the provisions of the laws for the assessment and collection of taxes, railroad corporations are residents of the towns through which the railroad passes.

(Argued May 17, 1871; decided September term, 1871.)

THESE are appeals by the relator from judgments of the General Term of the Supreme Court, in the eighth judicial district, affirming the assessment made against the relator by the respondents, as assessors in the towns of Evans and Hamburg, in the county of Erie.

The questions arising on these appeals in the two actions are the same. The original proceeding was upon returns made to a certiorari issued in each action.

The relator is a body corporate and politic, organized and doing business in this State under the general railroad act of the State. The railroad it constructed and operates extends from the first ward in the city of Buffalo, along the southern shore of Lake Erie, to the line forming the boundary between the States of New York and Pennsylvania. The track is located and built through the towns of Evans and Hamburg, in this State. The assessors of each of these towns, in 1866, placed the lands belonging to the relator on the assessment rolls of their respective towns for the year 1866, with a valuation, for the purpose of taxation. The amount of land belonging to the relator in the town of Hamburg is stated, on the assessment roll of that town, to be 82 $\frac{7}{10}$  acres, and the valuation is put at \$265,000. On the 21st day of August, 1866, the relator appeared before the assessors, by its vice-president, who was examined by the assessors as to the value of the real estate thus entered on their roll, including the superstructure and fixtures thereon, consisting of "ties, chairs, rails, spikes, frogs

## Statement of case.

and switches." This estimate included nothing for grading the road, laying the rails, for cattle-guards, culverts, bridges, or the materials included in them, nor was any estimate given of the value of the fences thereon. The testimony thus taken stated the entire value of the land and superstructure and fixtures as not exceeding \$68,667.70. The assessors reduced the valuation \$40,000, leaving it to stand on the rolls at \$225,000.

In the town of Evans the assessors entered on their roll for the year 1866, the relator's land at  $92\frac{2}{100}$  acres, with a valuation of \$160,000. On the 21st day of August, 1866, the relator appeared before the assessors, by its vice-president, who was examined by them, under oath, relative to the value of the real estate entered upon the roll, including the superstructure, which embraces "the ties, chairs, rails, spikes, frogs and switches." The value, as made by him, was \$70,880.40. The assessors, on the 25th day of August, 1866, reduced the valuation \$10,000, leaving it \$150,000 upon the rolls.

The relator afterward sued out the writs in these proceedings, and the assessors and supervisors made their return. By the return it appeared that the assessors imposed the tax upon the relator as for resident lands, and not as for non-resident lands.

The General Term dismissed the writs as to the assessors, on the ground that their duty was ended before the writs were served, but retained it as to the supervisor, and affirmed the proceedings of the assessors. The relator appeals to the Court of Appeals.

*John Ganson* for appellants. Assessors are bound to take and pass upon the evidence, and must be governed by the ordinary rules governing judicial officers. They cannot act arbitrarily or capriciously. (Laws of 1851, 176; *People v. Reddy*, 43 Barb., 539, 544; *People v. Assessors of Albany*, 40 N. Y., 55.) The principle of the assessors' valuation was wrong. (*A. and S. R. Co. v. Osburn*, 12 Barb., 223; *Oswego Starch Factory v. Dolloway*, 21 N. Y., 449; *People v. Board*

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Opinion of the Commission, per HUNT, C.

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of *Assessors*, 39 id., 81.) The court has the power to correct this assessment. (*People v. Board of Assessors*, 39 N. Y., 81; *People v. Assessors of Albany*, 40 id., 155.) The relator's lands should have been taxed as non-resident lands. (1 R. S., 389, §§ 1, 2, 3; *N. Y. and H. R. R. Co. v. Lyon*, 16 Barb., 651-5; *Whitney v. Thomas*, 23 N. Y., 281, 285.) The town or ward where the chief office of a corporation is, is its place of residence. (*Connell v. N. P. Ins. Co.*, 10 How., 403; *Hubbard v. Same*, 11 id., 149.) Where lands are non-resident lands, the collector is not authorized to levy upon personal property. (*N. Y. and H. R. R. Co. v. Lyon*, 16 Barb., 651; *Whitney v. Thomas*, 23 N. Y., 281.)

*P. G. Parker* for respondents. A railroad company is a resident of the several towns through which its road extends, within the meaning of the tax laws. (*Sherwood v. Saratoga R. R. Co.*, 15 Barb., 650; *The People v. Pierce*, 31 id., 138; *Belden v. N. Y. and Harlem R. R. Co.*, 15 How., 17.)

HUNT, C. Two principal points are urged by the appellants' counsel, upon which it is insisted that the judgments in question should be reversed. These are: 1. That the assessors adopted an erroneous principle in ascertaining the value of the relator's lands within their district; 2. That the assessment should have been made as for non-resident lands, and not against the relator personally as for resident lands. These points are elaborated into several branches, and I will consider such of them as seem to be important.

In the town of Hamburg the real estate of the relator was assessed at \$225,000. The vice-president of the road gave evidence tending to show that it was worth only \$68,667; and it is insisted that his evidence was controlling, and that a judgment should have been given in accordance with it. Again, it is insisted that the value of the land and its superstructure simply, without reference to its connections at either end, or its general profit, should determine the amount of the assessment.

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Opinion of the Commission, per HUNT, C.

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A reference to the statutory provisions on the subject of the assessment and taxation of real estate is necessary to a proper understanding of this subject.

It is provided, in general terms, that "all lands and all personal estate within this State, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereafter specified." (1 R. S., 387, § 1.) The exemptions do not relate to anything here in question. "Every person shall be assessed in the town or ward where he resides when the assessment is made, for all lands then owned by him within such town or ward, and occupied by him, or wholly unoccupied." (Id., 389, § 1.) "The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals." (Id., § 6.) These statutes are intended to provide that all real and personal estate within this State, with a few exceptions not necessary to be considered, shall be liable to taxation.

As to the manner in which the assessment shall be made, many directions are given. It is provided that "all real and personal estate shall be estimated by the assessors at its just and full value, as they would appraise the same in payment of a just debt due from a solvent debtor." (Id. 393, § 17, Laws 1851, ch. 176.) This rule is to be followed in all assessments, "except where the assessors shall be specifically required, by law, to observe a different rule." (Id.) A provision is made for the re-examination of those cases where a party deems himself aggrieved by the assessment, to wit, "they shall hear and examine all complaints in relation to such assessment as shall be brought before them." (Laws 1851, *supra*.) These complaints are to be determined in accordance "with section 15 of title 2." The original section fifteen here referred to, with sixteen and seventeen, and the amendments of the same by the act of 1851, are important to be understood. Section fifteen, as it originally stood, enacted that any person whose real and personal estate was taxed, might present an affidavit to the assessors to the effect that the real



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Opinion of the Commission, per HUNT, C.

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or personal estate owned by him did not exceed in value a certain sum to be named, and it was made the duty of the assessors to assess the same at the sum named and no more. (Rev. Stat. as amended.) Section sixteen contained the same authority as to trustees. In section seventeen it was declared that all real and personal estate, the value of which shall not have been so specified by affidavit, shall be estimated at its full value, as the assessors would appraise the same in payment of a just debt due from a solvent debtor. (Id.) Under this statute it was the evident duty of the assessors to value the property at the sum specified in the affidavit, although their own judgment may have been entirely different, or although they may have been satisfied that the statements were dishonestly made. A different rule was established by the act of 1851 (chapter 176, page 332). It was there enacted that the sections 15, 16, 22, 23, 24, 25 and 26 should be repealed, and that section 17 should be amended so as to read as follows: "All real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor." The other sections declared to be repealed with the substitutes, are equally significant. By section twenty-two, thus repealed, it was declared that at their meeting for review, if a person had not previously made an affidavit, he might then make it, and the assessors should reduce the assessment to the sum specified in the affidavits. Section twenty-three authorized the proof to be made by other means than the affidavit of the party. Section twenty-six gave the form of the certificate to be made by the assessors, to the effect that they had assessed the real estate according to their best information, and that, with the exception of those cases in which the value had been sworn to by the owner, they had estimated the value at the sum at which they would appraise the same in payment of a just debt due from a solvent debtor. A similar statement was contained in it in respect to personal estate. This was all changed by the law of 1851. The certificate then stated that they had set down all the real estate according to their best

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Opinion of the Commission, per HUNT, C.

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information, and that, with the exception of those cases in which the value had been changed by reason of the proof produced, they had estimated the value at the sum at which they would appraise the same in payment of a just debt due from a solvent debtor.

Assessors are citizens chosen from their respective towns, who, in theory of law and in fact, have personal knowledge of the value of the real estate in their towns. In the first instance they form their own judgment of the value of each piece of real estate and place it in the third column of their assessment roll. This judgment they form from the best information in their power, derived from their own knowledge and experience, and from such communications as they may confide in. According to the system in force before 1851, this judgment gave way, absolutely, to the affidavit of the owner. His statement of value was conclusive, and it was the duty of the assessors to adopt it, whatever their own judgment might be. According to the law of 1851 this affidavit was evidence before them, and to be considered by them with the other means of information in their power; and, upon the whole, their own judgment was to be formed of the value. If this proof or any other evidence before them "changed the value of the real estate," they accepted such change and gave the statement. If it changed it to the extent claimed by the owner, or if only to a modified extent, the value was stated accordingly. It was the evident intention of the legislature to abolish the rule that the affidavit of the owner should be conclusive evidence of value. There is no rule left except the judgment of the assessors upon the whole case, the affidavit included. The statute of 1858 (chapter 536, page 122) adopted and confirmed the rule of the statute of 1851 in this respect. After the examination is taken and after hearing such further evidence as may be given, "they shall fix the value at such sum as they may deem just under the rule prescribed by section twenty of this title." The only rule prescribed in the title is the amended one, which I have already cited from the statute of 1851. I am quite satisfied,

therefore, that the assessors acted legally in deciding upon their own judgment, not giving full credit to the opinions or statements contained in the examination of the relator's vice-president, if their judgments were not convinced thereby.

Nor do I see any error in the principle said to have been adopted in determining the value of the land in question. In Hamburg the land amounted to  $82\frac{18}{100}$  acres. It was a narrow strip of a few rods in width, with the buildings, stations, etc., necessary for the accommodation of a railroad. The argument of the relator's counsel is that this should be assessed as an isolated piece of land, having in substance no beginning or end; that is, not connected with anything at either end beyond the limits of the town. A railroad through the town of Hamburg only, having no connection at either end, would be of no value. The erections and superstructure would destroy its value for farming purposes. As a railroad it would have no passengers and no business, and would be worthless. The attempt to use it as such would involve debt and embarrassment, but no profit. In like manner, the portion of the Erie canal passing through a single town, with no outlet at either end, would be valueless. A mill-race disconnected from the mill would be of no value. The mill severed from its race would be of little value. A block of stores, walled off from all neighboring connections, or deprived of the value resulting from adjoining business and commerce, would be of little value. Each item of property, however, with its connections and accompaniments, and used for the purpose and in the manner intended, might be of great value. Each piece of property is to be estimated in connection with its position, and the business and profit to be derived therefrom. The road in question is part of a whole, and is to be valued as such. This is independent of the taxation of the capital. It is an estimate of the value of the real estate for railroad purposes, as a mill is to be estimated for its value for milling purposes, and not at its value for a church or a banking-house. The capital of the railroad is ascertained and taxed at the place where its principal place of business is situ-

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Opinion of the Commission, per HUNT, C.

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ated. That is not in Hamburg nor in Evans, so far as the papers show, and whether the capital is \$100,000 or \$1,000,000 should not affect the present assessment, and, so far as the case shows, did not affect it.

The law seems to be reasonably certain upon this branch of the case. In the first general point of the appellant and its branches, I find nothing to justify a reversal of the judgment.

The appellant objects again that the lands in question are not assessed according to the forms prescribed by the statute. They are assessed to the relator personally, while it is insisted that they come properly under the head of "non-resident lands," and should have been so assessed. It is idle to deny that the proper mode of assessing these lands is involved in much doubt. This arises from the fact that when the tax laws of this State were passed, railroad corporations were unknown to us. No such institutions then existed in the State, and the laws respecting the assessment and taxation of real and personal estate reach them only, and quite awkwardly, through the laws respecting incorporations generally.

It is provided in general terms that the real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie in the same manner as the real estate of individuals. (1 R. S., 389, § 6.) As to individuals, the following provisions are made, on the same page: 1. "Every person shall be assessed in the town or ward where he resides when the assessment is made for all lands then owned by him within such town or ward, and occupied by him or wholly unoccupied." This section authorizes the assessment of lands to an individual, with the following limitations: 1. The lands must lie in the same town or ward in which the owner resides: 2. They must be occupied by him; or, 3. They must be wholly unoccupied. The lands in question, I think, are occupied by the relator, and it was the opinion of the General Term of the eighth district, in this case, that the relator might fairly be said to reside in every town through which its road passed. If so, the case falls

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Opinion of the Commission, per HUNT, C.

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evidently within the section quoted. If otherwise, then as evidently they cannot be assessed under that section.

The next section of the statute provides, that "lands occupied by a person other than the owner may be assessed to the owner or occupant, or as non-resident lands." As the lands in *Hamburgh and Evans* were not occupied by a person other than the owner, this section does not meet the case.

The third section enacts, that "unoccupied lands, not owned by a person residing in the town or ward where the same are situated, shall be denominated 'lands of non-residents,' and shall be assessed as hereinafter provided." Land cannot be deemed unoccupied that is fenced in, having a structure which is daily and hourly used for the passage of men and cars, having on it houses and buildings in which men eat and drink and sleep and spend their days. Lands that are unoccupied are the only lands that are to be denominated lands of non-residents, and assessed as such. The lands in question do not come under this provision. It is not easy to find the power of assessing these lands under any of the statutes which I have quoted, unless the company shall be deemed a resident of every town in which it owns lands.

The regulations for the assessment of taxes on incorporated companies are found in a subsequent part of the statutes. (1 R. S., 414.) It is there provided, that "all moneyed or stock corporations, deriving an income from their capital or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." (§ 1.) The second section is as follows: "The president \* \* \* or other proper officer of every such incorporated company shall, on or before the first day of July in each year, make and deliver to the assessors, or one of them, of the town or ward in which such company is liable to be taxed according to the provisions of the sixth section of the second title of this chapter, a statement specifying, 1. The real estate, if any, owned by such company, the towns or wards in which the same is situated, and the sums actually paid therefor; 2. The capital stock actually paid in, or secured to be paid in, excepting therefrom the sums paid for real estate,

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Opinion of the Commission, per HUNT, C.

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and the amount of such capital stock held by the State or by any incorporated literary or charitable institution; and, 3. The town or ward in which the principal office or place of transacting the financial business of such company is situated, or, if there be no such principal office, the town or ward in which its operations are carried on, or in which it is liable to be taxed under the provisions of this chapter."

Section 6 then provides, that "the assessors shall enter all incorporated companies from which statements shall have been received by them, and the property of such companies, and the property of all other incorporated companies, liable to taxation, in their respective towns, in the following manner: 1. They shall insert in the first column of their assessment rolls the name of each incorporated company in their respective towns or wards liable to taxation on its capital or otherwise, and under its name they shall specify the amount of its capital stock paid in and secured to be paid in, the amount paid by such company for real estate then belonging to such company, wherever the same may be situated, the amount of all surplus profits or reserved funds exceeding ten per cent of their capital, after deducting therefrom the said amount of said real estate, and the amount of its stock, if any, belonging to the State or to any literary or charitable institution; 2. In the second column they shall enter the quantity of real estate owned by said company and situated within their town or ward; and in the third column the actual value thereof, estimated as in other cases; 3. In the fourth column they shall enter the amount of the capital stock of every incorporated company paid in and secured to be paid in, and of all surplus profits or reserved funds as aforesaid, after deducting the sums paid out for all the real estate of the said company, wherever the same may be situated and then belonging to it, and the amount of stock, if any, belonging to the State and to incorporated literary and charitable institutions." By section fifteen the amount of taxes assessed on all incorporated companies liable to taxation shall be set down by the board of supervisors in the fifth column of the corrected assessment

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Opinion of the Commission, per HUNT, C.

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roll, and shall form a part of the moneys to be collected by the collector.

It is further provided that the collector shall demand the tax of the proper officer; if not paid, shall endeavor to collect the same, and if unsuccessful shall return an affidavit thereof to the county treasurer, who shall certify the same to the comptroller, who shall pass the same to the credit of the county treasurer "as in the cases of taxes on the lands of non-residents." (§§ 17-21.)

The provisions of this title are intended primarily to furnish the means and the rule of assessing the capital stock of incorporated companies, where such capital is assessable, and at the place where its chief place of business is situated. They also furnish, I think, a sufficient basis for assessment and taxation of the lands of a railroad company in those towns and counties remote from its principal place of business. The following, among other reasons, suggest themselves: 1. It is the evident intention of the statute that the real estate of all persons and corporations, wherever situated, shall be subject to taxation. Thus it is expressly enacted that "all lands and all personal estate within this State, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." (1 R. S., 388, § 1.) And again: "The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals." (*Id.*, 389, § 6.) In my reading of the statutes there is no other place than in this title, in which provision is made for the taxation of lands owned by a railroad company, occupied by them but located in a town or ward of which they are not residents, or where their principal place of business is not located. The declaration is express that such lands shall be taxed, and in the towns where situated. For the past thirty years, and within the knowledge of every legislature, they have been so taxed by the towns. If there is, then, to be found, in this statute, language which justifies this action of the assessors, although not intended primarily for that pur-

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Opinion of the Commission, per HUNT, C.

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pose, and although not so explicit in its terms as if it had been primarily so intended, it should be deemed to express the intention of the legislature, and the action of the assessors should be sustained.

2. That the provisions of the statute regulating the assessment of incorporated companies justifies the action we are considering, may be inferred from the language of the second section (p. 414, § 2). The president is there directed to deliver the statement above described "to the assessors of the town or ward in which such company is liable to be taxed, according to the provisions of the sixth section of the second title of this chapter." Here is a declaration that the company is liable to be taxed according to the provisions of section six. Upon turning to that section we find this definition of such liability:

"§ 6. The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall be, in the same manner as the real estate of individuals." \* \* \* (p. 389.)

It is conceded that the relator is an incorporated company, liable to taxation, and we have in this sixth section a declaration that its real estate shall be assessed in the town or ward in which the same shall lie. The assessors of Hamburg and Evans, finding portions of its real estate in their respective towns, have acted upon this authority, and included the same in their assessment rolls.

3. The action of the assessors, directed to be taken upon the receipt of the statement already referred to (p. 415), has a bearing upon the question before us. By section 6 they are directed to enter in their assessment rolls all incorporated companies from which statements shall be received, "and the property of such company liable to taxation in their respective towns, in the following manner." This language includes all their property, the capital not only, but the real estate; the real estate in the town of its residence or place of business not only, but the real estate wherever situated. It is also to be entered by the assessors in their respective towns, and in



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Opinion of the Commission, per HUNT, C.

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their assessment rolls, thus indicating the several towns and several rolls where lands may be, rather than one roll and one town where its capital is to be taxed.

4. The assessors are directed to insert in the first column the name of each incorporated company in their town or ward liable to taxation on its capital or otherwise. (*Id.*) If in such town the company is liable to taxation on its capital, its name is to be entered. If it is not then liable to taxation on its capital, but is liable to taxation for any other cause, "or otherwise," it is to be so entered. In the town of Hamburg, the relator, if not liable to taxation on its capital, was liable to taxation for another cause, to wit: the ownership of real estate in the town, and its name was therefore properly entered.

5. The assessors in question perhaps had not the means nor was it their duty to enter the amount of the relator's capital stock, with the deductions pointed out by this statute. They had no power to make the basis of a tax on its capital, and a statement or assessment of its capital was not necessary, perhaps not possible. The entries required by subdivisions 1 and 3 were, therefore, not attempted to be made. Subdivision 2 required the entry in the roll of the quantity of real estate of the company situate within the town, and of its actual value estimated as in other cases. While this duty would be exercised by the assessors who also assessed the capital stock, the language is pertinent and appropriate to an assessment of real estate only. The directions are appropriate to those assessors upon whom a duty is devolved. Where the duty is not devolved upon certain assessors, to them such portions of the directions are not applicable.

I prefer, to base my judgment in the case upon the theory, that a reasonable construction of the statutes regulating the taxation of incorporated companies, embraces the case before us, to holding that the relator is a resident of any town through which its road passes. On that proposition I express no opinion.

Upon the whole case, I am of the opinion that the action

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Statement of case.

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of the assessors of the towns of Hamburg and Evans was justified by law, and that the judgments below should be affirmed with costs.

All concur.

LOTT, Ch. C., LEONARD, GRAY and EARL, CC., also for affirmance on the ground that railroad corporations are residents of each town or ward where they own real estate, within the provisions of the tax laws.

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JOHN S. HICKS, Appellant, v. NEWCOMB CLEVELAND,  
Respondent.

A verbal agreement for the sale of property void by the statute of frauds cannot be ratified by an assignment by the vendor of an account against the vendee therefor. The sale can only be rendered valid by the concurrence of both the vendor and the vendee in some one of the things required by the statute to give it validity.

B. gave to G. a verbal order for a bill of furniture to be shipped to B. at Milwaukie; prior to its arrival B. left Milwaukie, leaving word that the furniture be returned to G. Upon the arrival of the furniture at Milwaukie it was seized by the sheriff as the property of B. by virtue of a writ of attachment against him. While in the possession of the sheriff G. assigned his interest therein to plaintiff. After the assignment judgment was perfected in the action, wherein the attachment was issued and execution issued thereon. By virtue thereof the sheriff levied upon and sold the property under the directions of defendant, the judgment creditor. No demand for the goods was made by plaintiff.

*Held*, that the seizure of the property, by virtue of the attachment, did not change the title; it remained in G., and was transferred to plaintiff. Every fresh interference therewith was a new wrong, and the seizure and sale thereof by virtue of the execution was a conversion, for which plaintiff could recover.

(Argued May 18th, 1871; decided September term, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming judgment entered upon verdict in favor of defendant.

This is an action of trover, and is brought by the plaintiff

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Statement of case.

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against defendant for a wrongful conversion of personal property of the value of \$1,500.

The complaint sets up that at Milwaukie, in the State of Wisconsin, defendant wrongfully converted and disposed of the personal property of the plaintiff, consisting of household furniture of the value of \$1,500, in the early part of January, 1855, or about that time, and claimed damages in the sum of \$1,500 and interest thereon from the alleged date of conversion, and costs.

The answer, first, denies each and every allegation of the complaint; and, second, alleges that the property in question was not the property of the plaintiff, but of one Levi Blossom, against whom the above defendant, Newcomb Cleveland, on the 5th day of April, 1855, had recovered judgment in the County Court of Milwaukie county, in the State of Wisconsin, for the sum of \$3,205.25; that on the 7th day of May, 1855, an execution was issued on said judgment against the goods and chattels of said Levi Blossom to the sheriff of said Milwaukie county; and that in virtue thereof said sheriff took the goods in the complaint named as the property of said Blossom and sold and converted the same under and by virtue of said execution, as he lawfully might, which was the conversion of plaintiff's property complained of, and no other.

The action was tried at the circuit in the city of New York in February, 1865, before a justice of the Supreme Court and a jury, and the following facts appeared:

In 1854 one William C. Gardner resided in New York city and carried on the business of a cabinet-maker and furniture dealer in said city, and in July or August of that year one Levi Blossom, who then resided in Milwaukie, ordered a bill of furniture from him, the property described in the complaint. The order was a verbal one. The goods were to be sent to Blossom, at Milwaukie, to the care of Thomas P. Williams. Blossom was to give his acceptances for the amount of the bill on delivery of the goods at Milwaukie, payable in six months. The goods were sent according to directions about the 20th of October, 1854, and went to

## Statement of case.

Milwaukie by the lakes and canals. In October, 1854, Gardner drew two drafts on Blossom for the amount of the bills and forwarded them to Milwaukie for Blossom's acceptance. They bore date, respectively, 9th and 30th October, 1854—were for \$514.25 each, and each payable six months after date. The two drafts were returned to Gardner a few days after he sent them forward for acceptance, unaccepted. Blossom did not receive the property. He left Wisconsin for the State of California before the goods arrived, and did not return there again in some year and a half or two years. Before leaving Wisconsin, Blossom directed one Watkins to inform Mr. Gardner that he would not receive the property, and return the same to Gardner if it should arrive. Blossom never gave any bill or acceptance for the goods. About the 27th day of November, 1854, Gardner learned that Blossom had left for California, and immediately wrote a letter to one O. K. Watkins, and sent it to him, authorizing Watkins to take possession of all of the several boxes of furniture in store at Milwaukie, marked Levi Blossom, in his, Gardner's name, and hold them as his property until further orders.

On the 24th day of November, 1854, a writ of attachment against the property of said Blossom, directed to the sheriff of Milwaukie county, was issued out of the County Court of Milwaukie county, in an action therein pending wherein Newcomb Cleveland was plaintiff, and said Blossom was defendant, commanding him to attach so much of the property of said Blossom in his county as might be necessary to satisfy the demand in suit. In executing this writ, Herman L. Page, the then sheriff of Milwaukie county, on the 24th day of November, 1854, seized and attached as Blossom's property the furniture in question, Cleveland having first given said sheriff a bond of indemnity.

On the 18th day of January, 1855, Gardner executed to the plaintiff in this action an instrument, of which the following is a copy: "This is to certify that I have, this eighteenth day of January, 1855, for and in consideration of one hundred dollars, assigned, sold and delivered into the

## Statement of case.

hands of John S. Hicks, of the city and county of New York, my account against Levi Blossom, formerly of the city of Milwaukie, for the purchase of a large bill of cabinet furniture, amounting to \$1,028.50, which lot of furniture has been seized by the sheriff of that county for the debts of the said Levi Blossom, and sold for the benefit of certain of his creditors. It is further understood and agreed that the said Hicks is to assume the responsibility and expense of suit for the collection, if possible, of said claim, and appropriate the proceeds, if any, to his use and benefit.

“WILLIAM C. GARDNER.” [L.S.]

On the 5th day of April, 1855, judgment final, in favor of Cleveland against Blossom, in the action, in which the attachment was issued, was entered, for \$3,205.25, damages and costs.

May 7th, 1855, a *fi. fa.* was issued on said judgment to the sheriff of Milwaukie county, commanding him to take the goods of Levi Blossom to satisfy said judgment.

June 2d, 1855, Samuel S. Conover, the then sheriff of Milwaukie county, sold the property in question under the *fi. fa.* He had, after the execution came into his hands, levied upon it, by order of Cleveland, as the property of Blossom, under the writ, and suspended the sale until Cleveland had given him a bond of indemnity.

June 13th, 1855, Cleveland receipted to Conover for \$472.41, on account of the execution.

The evidence showed \$633.50 to be a fair market value of the property at Milwaukie, at the time of conversion.

About two years after these goods were attached, and a short time before the commencement of this suit, which was in February, 1857, Mr. Gardner, at the suggestion of the plaintiff and his attorney, interlined in the assignment of January 18, 1855, after the figures “\$1,028.50,” the following words: “and said furniture itself.” The following is the evidence of Mr. Gardner, and all the evidence in the case as to this interlineation: “The words, ‘and said furniture

## Statement of case.

itself,' were interlined at the suggestion of Mr. Hicks and the attorney; it was done with the three together, by consent, about two years after the goods were taken; I supposed I had written the assignment correctly, but, not being a lawyer, I learned that I did not cover the ground.

"Q. Will you explain what was the original agreement; what was talked over between you and Mr. Hicks at the time you made the assignment of January 18, 1855? A. It was agreed that Mr. Hicks should prosecute—follow the furniture; and when I drew this I supposed I covered all that ground.

"Q. What was the agreement? A. That he should follow this furniture, prosecute, and recover, if possible to do so.

"Q. What was said? A. The bargain was that he should get the furniture, and I made the assignment to him in the expectation that he would push the matter; get the furniture seized and go on and recover it.

"Q. Was there anything said between you and Hicks at the time about the furniture being in Milwaukie, or as to where it was? A. Yes, sir; I said it was in Milwaukie; that it had been seized, and that the agreement was that he should recover it, if in any legal way possible to do so.

"Q. Tell what was said between you and Hicks? A. We talked the matter over.

"Q. What was said? A. Something like this: that he was to get the property or its value.

"Q. What were you to do? A. I was to assign it to him and I drew up the assignment; that was an agreement that he should prosecute and recover the value of the property.

"Q. Was there anything said between you and him as to whether the sheriff had taken the property? A. Certainly; we both knew that the property had been seized by the sheriff.

"Q. Have you anything more to say in regard to the transaction between you and him? A. The agreement was that I should assign the goods to him, and the claim, and that he

## Statement of case.

should prosecute and recover at his own expense and for his own benefit; this is as near as I can recollect.

"Q. Did you speak to Hicks in reference to this matter, or he to you? A. I spoke to him.

"Q. What did you tell him? A. I told him I wanted him to prosecute the matter, and I would assign the property to him for a consideration, and I did so for \$100; that, however, was merely nominal; he paid me more than that; I drew the assignment in accordance with the agreement."

On the cross-examination of the witness by defendant's counsel, the witness said:

"Q. What claim did you assign? A. The claim against Blossom; that is the way the assignment reads, I suppose; the words, 'and the furniture itself,' were interlined, I think, some time in 1857, before the commencement of the suit; it might have been a short time before."

No demand was made by plaintiff of defendant for the goods before the commencement of this action.

At the close of the evidence the court held that plaintiff was not entitled to recover, and directed the jury to find a verdict for the defendant, and the plaintiff excepted to the ruling of the court, and the jury found a verdict for the defendant.

From the judgment entered upon this verdict the plaintiff appealed to the General Term of the first district, and from judgment of affirmance there to this court.

*Alexander Spaulding* for appellant. The contract could be reformed by consent, and such reformation would vest title in plaintiff, as of the date of the original instrument. (*Gillespie v. Moore*, 2 John. Ch. R., 585; *Story's Eq. Jurisp.*, § 161.) It is the duty of the court to so construe the assignment as to give force and effect to the instrument. (*Story on Con.*, § 660; 17 N. Y., 468; *McKee v. Judd*, 2 Kern., 626.) Any unlawful interference with property after assignment gave plaintiff right of action without demand. (*N. Y. Car Oil Co. v. Richmond*, 6 Bosw., 213; 5 Cow. & Hill's Notes,

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Opinion of the Commission, per EARL, C.

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224.) A sheriff acts at his peril in levying. (*Kulkmann v. Orser*, 2 Duer, 242.) The sale put it out of defendant's power to comply with demand. None, therefore, was necessary. (*Everitt v. Coffin*, 6 Wend., 668; *La Place v. Auprie*, 1 John., 406, and cases cited; *Cortelyou v. Lansing*, 2 Caine's Cases, 218; *Davidson v. Donadi*, 2 E. D. Smith, 121; *Vincent v. Conklin*, 1 E. D. Smith, 203; *Glassner v. Wheaton*, 2 E. D. Smith, 352; *Esmay v. Fanning*, 5 How., 228; *Sharp v. Whipple*, 1 Bosw., 557.)

*Henry E. Knox* for respondent. If the words added to assignment can be regarded as a conveyance of the property in order to perfect right, it was necessary to make demand. (*Hall v. Robertson*, 2 Comst., 293; *Sherman v. Elder*, 24 N. Y., 384; *Duell v. Cudlip*, 1 Hilt., 166; *Cass v. N. Y. and N. H. R. R. Co.*, 1 E. D. Smith, 522; *Hassell v. Borden*, 1 Hilt., 128.)

EARL, C. It is not claimed on the part of the respondent that any title to these goods was ever vested in Blossom. The sale was void by the statute of frauds. There was no delivery, acceptance, part payment or memorandum in writing. Hence the defendant was an undoubted wrong-doer in causing this property to be attached and sold as the property of Blossom. The cause was first tried in 1860, and the plaintiff had a verdict. The defendant appealed and a new trial was granted, Mr. Justice INGRAHAM writing the opinion, from which we extract the following: "The assignment transfers the bill for the prices of the goods and the goods themselves, but does not transfer any claim for damages, either for previous conversion of the goods, or for a trespass for taking them. Originally the assignment was only for the bill of the goods sold, made in January, 1855. The property was sold by the sheriff in June, 1855. The alteration of the paper, so as to include the sale of the goods, was two years after, or in 1857. It is clear the first assignment did not transfer this claim, but ratified the sale. The subsequent sale of the goods,



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Opinion of the Commission, per EARL, C.

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after the conversion and sale with knowledge, did not give a right of action for the previous trespass or conversion. If it was of any avail, it could only be so on a demand, after the conveyance of the goods was complete."

There was a second trial in 1862, and a verdict was taken for the plaintiff, subject to the opinion of the General Term; and the General Term in 1868 set aside the verdict and ordered a new trial substantially upon the same grounds as before.

It is important first to determine what the plaintiff really got by his purchase from Gardner. The assignment, as drawn, was clearly only of an account for the goods against Blossom. But Gardner had no account or claim against Blossom. The sale to him was entirely void. I am unable to see how making out and assigning this account ratified the previously void sale. The sale could in no legal sense be ratified; but it could be rendered valid only by a compliance with the statute of frauds, which could only be by the concurrence of both the vendor and the vendee in some one of those things required by the statute. Hence, the assignment, as originally drawn, did no harm, if it did no good.

It must be conceded that the interlineation, so far as this case is concerned, gave the plaintiff no new rights, and in no way bettered his position. He must stand or fall by what took place when the assignment was executed.

The plaintiff could purchase the property or a claim for damages for its conversion, without a writing. As it was of the value of more than fifty dollars, he was simply required to comply with the statute of frauds; and this he did by paying the whole or a part of the purchase-money. If, therefore, by mistake, as now claimed, the writing did not express the intention of the parties, and did not cover the property really sold, the plaintiff did not lose the property, but can show, by parol, precisely what it was that he bought. Before the commencement of this suit, the parties to the writing got together and made the interlineation, so as to conform it to their origi-

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Opinion of the Commission, per EARL, C.

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nal intention ; so that it no longer, as evidence, in any sense, concluded even the parties to it, as originally drawn.

What, then, does the parol evidence show that the plaintiff actually bought of Gardner? Most clearly, the property. Gardner, by the sale, clearly meant to give him the right to pursue and recover the property, or its value. He says it was the agreement that he should assign the goods and the claim for the property to him. I think there would be but little difficulty, upon the evidence, in also holding that he assigned to the plaintiff his claim for damages for the conversion. (*McKee v. Judd*, 12 N. Y., 622; *Waldron v. Willand*, 17 id., 466; *Sherman v. Elder*, 24 id., 381; *Whitney v. Slauson*, 30 Barb., 276; *Hall v. Robinson*, 2 N. Y., 293.) But it is not necessary to go so far in this case. He purchased the property January 18, 1855, after it had been attached by Sheriff Page, who kept it in his possession until January 1, 1855, when he delivered it over to his successor in office, Sheriff Conover. For the conversion by Sheriff Page the plaintiff in this action could not recover, for the reason that that was before the sale of the property to him, and he never made any demand after the sale to him.

But this seizure of the property by virtue of the attachment did not change the title to the property. It still belonged to Gardner, and his sale of it conveyed the title to the plaintiff. After the plaintiff got the title, the defendant caused the property to be seized by virtue of the execution in his favor against Blossom, and sold; and this was a conversion of the property, of which this plaintiff had the right to complain. Every fresh interference with the property was a new wrong.

The defendant first caused the property to be attached by Sheriff Page; for this he became liable to Gardner, if he chose to prosecute him. He then caused the property to be seized upon the execution and sold; and this was a wrong to this plaintiff, for which he can prosecute him; and, hence, upon the plainest principles of law, and the plaintiff can recover.

And, for this last interference with the property, the defend-

## Statement of case.

ant is liable without a previous demand. He was a naked wrong-doer, without any color of right. I do not think that the property was so in the possession of Blossom that even the sheriff could have justified a seizure of it; but it is sufficient, as against this defendant, to show that he caused the property to be wrongfully seized and sold after the plaintiff had purchased it.

These views lead to the reversal of the judgment and a new trial.

All concur, except LEONARD, C., not sitting.

Judgment reversed and new trial granted; costs to abide event.

THE BUFFALO AND STATE LINE RAILROAD COMPANY, Respondent, v. THE BOARD OF SUPERVISORS OF ERIE COUNTY, Appellant. (Four cases.)

48	98
117	83
48	98
123	496

48	98
172	41

A railroad corporation which passes through and occupies lands in several counties for the carrying on of its corporate business, is, for the purposes of taxation, to be regarded as a resident of each town and county through which it passes. Its real estate is, therefore, properly assessed *in personam* as the land of a resident, and not as non-resident land.

In cases where assessors have jurisdiction, they are to decide all questions of law as well as of fact. It is for them to determine, where there are facts calling for the exercise of their judgment, whether land is to be assessed as resident or non-resident land. Whatever may be their decision, they have the immunity of judicial officers. Both they and all persons who act upon their assessment in enforcing the tax are protected, and the tax after it has reached the treasury of the county cannot be collected back. The decision of the assessors cannot be attacked collaterally.

A flagrant disregard of the facts or assessing in opposition to the clear and undisputed facts, where the application of the statute could not be doubtful, might present a case where the assessors would be without jurisdiction.

It is not necessary that the affidavits of the assessors attached to the roll should comply literally with the statute. A substantial compliance is sufficient.

The Superior Court of the city of Buffalo has jurisdiction of an action against the board of supervisors of Erie county, where the summons is served upon the chairman or clerk of the board in that city.

(Argued May 18, 1871; decided September term, 1871.)

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Statement of case.

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THESE are appeals by the defendants from judgments of the General Term of the Superior Court of Buffalo, affirming judgments in favor of the plaintiff in three of the cases, and ordering judgment for the plaintiff, in one case, on a verdict and exceptions heard at the General Term in the first instance.

The facts are substantially the same in each of the cases.

The complaint is for the recovery of money belonging to the plaintiff, had and received by the defendants.

The answer of the defendants sets up a want of jurisdiction of the Superior Court of Buffalo; and that the money was lawfully collected as a tax upon the real estate of the plaintiff for the years 1865 and 1866; two of the actions being for a tax collected for those years on lands in the town of Hamburgh, and two on lands in the town of Evans. The lands so assessed constitute the track of the plaintiff's railway, extending from the city of Buffalo along the Lake shore westerly, passing through several towns of Erie county, including the said towns of Hamburgh and Evans.

The said company occupied the lands so assessed in the usual manner of a railroad having water stations and depots, and running their cars and engines over the land assessed, which was not otherwise used or occupied. The tax was assessed against the plaintiff in each of the said towns, as upon the lands of a resident.

The money was made by collectors of the said towns, on the warrants of the supervisors, by levy and sale of personal property belonging to the said company, and the amounts so made were paid into the county treasury.

The plaintiff is a corporation under the laws of the State of New York, having an office at the city of Buffalo, where the financial business of the company is transacted.

The board of supervisors hold their sessions as a board at the said city, where their clerk and the county treasurer reside, and the summons in the action was served on the clerk at that place.

At the close of the evidence in each case, a motion to dismiss the complaint was made for the want of jurisdiction of

## Statement of case.

the court. The motion being denied, the defendants excepted.

They also moved for a nonsuit on the following grounds: first, that an action for money had and received could not be sustained upon the facts proved; second, that no cause of action was proven against the board of supervisors; third, that the tax was duly and legally assessed, levied and collected. The defendants excepted to the refusal of the court to grant this motion. In the action tried by the court, the same facts were found by the judge; and he held, as conclusions of law, that the assessments were wrong, for the reason that the lands should have been assessed as the lands of a non-resident; that there was no warrant or authority in the law for enforcing the tax by levy and sale of the personal property of the plaintiff; that the assessment against the plaintiff on the roll was void, and that the plaintiff was entitled to recover.

The defendants duly excepted to each of the said conclusions of law.

*P. G. Parker* for appellants. The Superior Court of Buffalo had no jurisdiction. (*International Bank v. Bradley*, 19 N. Y., 245, 251, 252; *Buel v. Boughton*, 2 Den., 91; *Brady v. The Supervisors, etc.*, 2 Sand., 460; affirmed, 6 Selden, 260.) The action for money had and received cannot be maintained upon the facts here. (*Swift v. City of Poughkeepsie*, 37 N. Y., 511; *Harlem Railroad Co. v. Marsh*, 12 N. Y., 308; *Hill v. Supervisors*, 12 N. Y., 52; *Paush v. Golden*, 35 N. Y., 462; *Boyce v. Board of Supervisors of Cayuga County*, 20 Barb., 94; *Brady v. Supervisors City and County of New York*, 2 Sand., 460; affirmed, 6 Selden, 260; *People v. Hawes*, 34 Barb., 78; *Martin v. Board of Supervisors Greene County*, 29 N. Y., 645.) The tax was legally assessed. (1 R. S., 5th ed., 908, §§ 1, 2, 3, 4; *The People v. Fredericks*, 48 Barb., 173, and cases there cited; *The People v. Beardsley*, 52 Barb., 105; affirmed, 41 N. Y., 619; *The People v. Cassity*, 2 Lansing's Reports, 294.) If assessment was erroneous as to quality of

## Statement of case.

land, its not being a jurisdictional defect cannot invalidate the assessment. (*Johnson v. Seam*, 30 Barb., 616.) The roll does not contain a description of the real estate so as to make assessment valid. (*Hubbell v. Weldon*, Hill. & Denio, 139; *Tallman v. White*, 2 N. Y., 66.) The action for money had and received will lie against the defendant to recover the money wrongfully taken from the plaintiff. (*Preston v. The City of Boston*, 12 Pick., 7; *Putnam v. Wise*, 1 Hill., 240, and note *a*; *Besley v. Taylor*, 5 Hill., 584, and note *a*; *The People v. Supervisors of Chenango County*, 1 Kernan, 563, 574, 575; *Porter v. Mount*, Am. Law Reg., March, 1866, p. 292.) The assessment being illegal, the roll and warrant could not empower the collector to divest the plaintiff of the title to the money. (*Whitney v. Thomas*, 23 N. Y. R., 281; *Mygatt v. Washburn*, 15 N. Y. R., 316; *The People v. Supervisors of Chenango County*, 15 N. Y. R., 563; *Wright v. Briggs*, 2 Hill., 77.)

*John Ganson* for respondent. Defendant cannot make title to the money through an illegal assessment. (*Whitney v. Thomas*, 23 N. Y., 281; *Hubbell v. Weldon*, Hill & Denio, 189; *Wright v. Briggs*, 2 Hill, 77; *Holden v. Golden*, 2 Trans. of Appeals.) The assessors had not jurisdiction to assess the plaintiff as a corporation. (*A. and S. R. R. Co. v. Osburn*, 12 Barb., 223; *People v. Assessors*, 39 N. Y., 83.) The real estate should be assessed as non-resident lands. (1 R. S., 389, §§ 1, 2, 3; *N. Y. and H. R. R. Co. v. Lyon*, 16 Barb., 651, 655; *Whitney v. Thomas*, 23 N. Y., 281.) The place where the corporation itself is to be taxed, and its capital, is to be treated as its place of residence. (*Oswego Starch Factory*, 21 N. Y., 449; *W. T. Co. v. Scheu*, 19 id., 408; *Cannel v. The N. P. Ins. Co.*, 10 How., 403; *Hubbard v. Same*, 11 id., 149.) The assessors did not take the requisite oath, (*Cook v. Staats*, 18 Barb., 407; *People v. Supervisors*, 15 id., 607, 615.) The affidavit is insufficient, and the defect is fatal. (*Van Rensselaer v. Whitebeck*, 3 Seld., 517; *Thurston v. Settle*, 3 Mass., 429; *Brown v. Smith*, 24 Barb., 219;

Opinion of the Commission, per LEONARD, C.

*Swift v. City of Poughkeepsie*, 37 N. Y., 571; *Forbes v. Van Wyck*, Abb., N. S., 469.) Plaintiff may be said to have been a resident of the town in which the land was. (*Western T. Co. v. Scheu*, 19 N. Y., 408; *Sherwood v. The S. and M. R. R. Co.*, 15 Barb., 650; *Tabor v. N. Y. and N. H. R. R. Co.*, 15 How., 17; *Fargo v. McVickar*, 38 id., 1; *Douglas v. The Mayor*, 2 Duer, 110.) Assessors are presumed to have done their duty, and it will be so conclusively presumed unless the contrary affirmatively appear. (1 R. S., 340, § 4; 1 R. S., 347, § 30; *Parish v. Golden*, 35 N. Y., 472; and see *Hartwell v. Root*, 9 Johns., 345; 1 Cowen & Hill's Notes, Phil. Ev., 296; *Windklaer v. Rockefeller*, 6 Cow., 247; *Williams v. The E. I. Co.*, 3 East, 192; *King v. Hawkins*, 10 id., 216; *McCoy v. Curtice*, 9 Wend., 17; *Downing v. Ruger*, 21 id., 178; *Doughty v. Hope*, 1 Comst., 79.) The provisions of the statute are directory, and a substantial compliance therewith is sufficient. (*Parish v. Golden*, 35 N. Y., 472; *Van Rensselaer v. Cottrell*, 7 Barb., 127; *Torry v. Milbury*, 21 Pick., 64, 67.)

LEONARD, C. The regularity of these assessments has been fully considered in two other cases between the same parties, in respect to the tax assessed by these towns for the year 1866.\* In those cases the question came up from the General Term of the Supreme Court, where it had been taken by certiorari, and the validity of the assessments sustained. The subject has been there examined in detail. If the assessments were a nullity, or void for the want of jurisdiction to impose them, it must be conceded that these actions were well brought. (*Whitney v. Thomas*, 23 N. Y., 281.) The lands in that case were assessed to William Merritt as the lands of a resident. The lands belonged in fact to Ogden, a non-resident; but they were not so assessed, and appeared on the assessment roll as the lands of a resident. The lands having been sold by the comptroller of the State, the non-resident owner brought ejectment and recovered them. The

\* See *The People ex rel., &c., v. Barker, ante*, p. 70.

sale was held to be void. The comptroller was without any authority of law to make a sale for taxes of lands assessed on the roll to a resident owner, and his deed as well as the sale was void. The assessment was also held to be void in that case for another reason, affecting the jurisdiction of the assessors. The lands were not assessed according to the fact, either as the lands of a resident owner or of a non-resident. They were assessed to a third person, who had no ownership or possession, and no connection with them. It was not a mere error of the assessors, but a disregard of the facts of the case. They entered a false judgment, not warranted by any facts proven. It could not be called a mistake of law or fact, such as the assessors, acting as *quasi* judicial officers, might honestly make. It was simply an assessment, without the slightest color to warrant or authorize it. Assessors can have no jurisdiction to assess any of the lands in their town to third persons who do not own, possess or have any connection therewith. It was there said: "If lands, belonging either to a resident or non-resident, could be assessed to a third person, having no connection with the premises, and be made the foundation of a sale and conveyance by the comptroller, great inconvenience and injustice might result. The true owner would be misled. He would have no notice of the assessment or of the proceedings upon it, and it would require extraordinary vigilance to discover and trace out such proceedings." This case was much relied on by the respondent's counsel, but it is not applicable here, unless the assessors were without jurisdiction. Jurisdiction is a subject which relates to the power of the court, and not to the right of the parties as between each other. (*People v. Sturtevant*, 9 N. Y., 269.) If the law confers the power to render a judgment, then the court has jurisdiction; what shall be adjudged between the parties, and with which is the right, is judicial action by hearing and determining it. (*The State of Rhode Island v. The State of Massachusetts*, 12 Peters, 718.)

When a court has jurisdiction, it has a right to decide every



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Opinion of the Commission, per LEONARD, C.

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question which occurs in the cause; and whether its decision be correct or otherwise, its judgment is binding in every other court. But if it act without authority, its judgments are nullities. (*Elliot v. Piersol*, 1 Peters, 328, 340; *Wilcox v. Jackson*, 13 Peters, 511.)

When the statute prescribes the mode of acquiring jurisdiction, the mode pointed out must be complied with, or the proceeding will be a nullity. (*Bloom v. Burdick*, 1 Hill R., 130.)

Objections not relating to the jurisdiction of the officer cannot be raised collaterally. (*Rusher v. Sherman*, 28 Barb. R., 416; *Stanton v. Ellis*, 2 Kern., 575.)

These axioms are elementary.

The assessors of the towns of Hamburg and Evans had jurisdiction to assess all the lands in their respective towns. It was made their duty, peremptorily, to do so. An error of judgment, as to the right or duty to impose the assessment on particular lands in the town, as to which an exemption is claimed, is not jurisdictional. (*Barhyte v. Shepherd*, 35 N. Y., 238.)

A flagrant disregard of the facts, or assessing in opposition to the clear and undisputed facts, where the application of the statute could not by any means be doubtful, might, as in the case of *Whitney v. Thomas* (*supra*), present a case where the officer would be without jurisdiction — assessing the lands of Ogden, a non-resident, as the lands of Merritt, a resident, who was neither an owner nor occupant, nor in any way connected with the land, appears to be such a flagrant disregard of the facts as to be a willful perversion of judgment, not to be regarded as an error, but as a judgment without jurisdiction. I think the Court of Appeals so regarded it. The application of the principle to the facts of each particular case is often attended with difficulty.

The assessors are *quasi* judicial officers, and the assessment roll, when finally completed by the supervisors of the county, stands as a judgment. (*Barhyte v. Shepherd*, *supra*; *Swift v. The City of Poughkeepsie*, 37 N. Y., 511.)

The validity of a judgment which is not void, but only voidable, cannot be assailed collaterally. It can be attacked for fraud, or mistake as to the facts, only by a direct issue as to such facts. The case of *Swift v. The City of Poughkeepsie* (37 N. Y., 511), like the present one, was an action to recover for money had and received under an alleged illegal levy and collection of a tax. The court there said that "a party cannot proceed a step in such an action, if, in order to sustain it, the court is called upon to review the merits or the regularity of the proceedings or determination, as the result of which the money was collected or paid over" (p. 514). It was also held that the proper remedy was by certiorari. The application of that remedy, in cases of irregular or illegal assessments, has since been affirmed, in *People v. The Board of Assessors of Brooklyn* (39 N. Y., 81,) and *People v. The Assessors of Albany*, (40 N. Y., 155.)

The informalities of the affidavit of the assessors do not render the assessment void. The statute is substantially followed. (*Parish v. Golden*, 35 N. Y., 462.) The objection that the Superior Court of Buffalo had no jurisdiction of this action is not tenable.

Persons having causes of action against the county are authorized to commence their suits against the board of supervisors, and process shall be served on the chairman or clerk. (1 R. S., 901, §§ 1, 2, 3, 5th ed.)

The summons was served in this case on the clerk of the board, at the city of Buffalo. This is to be regarded as a personal service on the board. The statute gives that court jurisdiction in any case where the defendant is personally served with summons in that city. (Sess. Laws 1854, p. 225.)

The board represents the county as a municipal corporation, and Buffalo is the county seat, where the sessions of the supervisors are held. The clerk resides and was served in that city. I think the defendants have been so served as to be within the meaning of the statute above referred to in regard to the jurisdiction of that court. On the ground first men-

tioned the judgment should be reversed and a new trial ordered, with costs to abide the event.

EARL, C. These are actions to recover money collected from the plaintiff, upon what is alleged to be a void assessment made in 1865 upon land of plaintiff, situated in the town of Hamburg, Erie county. The principal allegation of error in the assessment is that the land was assessed *in personam* as the land of a resident of that town, and not as non-resident land. I believe the assessment was correctly made. The statute (1 R. S., 388, § 1, Edmonds' ed.) provides, that all lands within the State owned by individuals or by corporations shall be liable to taxation; and hence this land was liable to taxation somewhere. It is further provided (2 R. S., 389, § 1) that every person shall be assessed in the town or ward where he resides, when the assessment is made, for all lands then owned by him within such town or ward, and occupied by him or wholly unoccupied. Section 2 provides that land occupied by a person other than the owner may be assessed to the owner or occupant, or as non-resident land. This section undoubtedly means that when the owner and occupant both reside in the town where the land is situated, the land may be assessed to either. When the owner does not reside in the town and the occupant does, it must be assessed to the occupant; and when neither of them resides in the town it must be assessed as non-resident land. By no other construction can I see how occupied land can be assessed as non-resident land as the statute as to the taxation of non-resident land provides that land occupied by a resident of the town shall not be taxed as non-resident. (1 R. S., 392, § 13.) Section 3 provides that unoccupied land not owned by a resident of the town shall be assessed as non-resident land, and section 9 provides that the assessors shall prepare an assessment roll and insert therein the names of the "taxable inhabitants" of the town. Taking all these provisions of the statute together, it seems to me quite plain that there is no authority

for placing upon the assessment roll for a tax *in personam* the name of any person not an inhabitant of the town.

Section 6 provides that "the real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie in the same manner as the real estate of individuals;" and hence it is claimed that unless the plaintiff can be regarded, in some legal sense, as a resident of the town of Hamburg at the time of the assessment in 1865, there was no authority to insert its name in the assessment roll.

While corporations are artificial, intangible, invisible beings, yet, in law, they are treated sometimes as persons, occupants, inhabitants, citizens. They exist by force of law, and can have an existence only within the jurisdiction in which they are created. Under the act of congress of 1789, commonly called the judiciary act, jurisdiction was conferred upon the circuit courts of suits between a citizen of the State where the suit is brought and a citizen of another State. The Supreme Court of the United States has held that, within this act, a corporation was a citizen of the State where it was created. (*Ohio and Mississippi Railroad Co. v. Wheeler*, 1 Black, 286.) By statute (22 Hen., 8, C. 5), concerning bridges and highways, it was enacted that bridges and highways shall be made and repaired by "the inhabitants of the city, shire or riding," and that the justices shall have the power to tax every "inhabitant of such city," etc., and that the collectors may "distrain every such inhabitant as shall be taxed and refuse payment," etc. Lord COKE (2 Inst., 703) says: "Every corporation and body politic residing in any county, riding, city or town corporate, or having lands or tenements in any shire *quae propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute." In *Rex v. Gardner* (Cowper, 79), the Court of King's Bench decided that a corporation came within the description of "occupiers or inhabitants" for the purpose of taxation, under a statute passed in the reign of Elizabeth.

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Opinion of the Commission, per EARL, C.

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It has been many times held by the courts that, under section 125 of the Code, requiring "actions to be tried in the county in which the parties, or any of them, shall reside at the commencement of the action," a railroad corporation is a resident of every county through which its road passes; and it has been held that such a corporation is so far a resident of every county through which its road passes that it cannot be sued in Justices' Courts by short summons. (*Belden v. New York and Harlem R. R. Co.*, 15 How., 17; *Sherwood v. Saratoga and Wash. R. R. Co.*, 15 Barb., 650.) In the latter case Mr. Justice WILLARD says: "A railroad company must be treated as an inhabitant and freeholder in each county where its track is laid." In *Glorie v. S. C. Railroad Co.* (1 Strobhart, 70), it is said that the residence of a company is most obviously where it is actively present in the operations of its enterprise. It will thus be seen that while corporations, in their general aspect, are mere ideal existences, without body or soul, yet they will be considered inhabitants, residents, citizens, when the general spirit and purpose of the law require it.

This corporation was created by the laws of this State to construct and operate a railroad through a portion of the State, and for that purpose was authorized to take and hold real estate along the line of its road. It was, therefore, a citizen, inhabitant and resident of this State, and either resided everywhere in the State, or at some place or places within it. To what particular locality in the State was its residence confined? Its residence might have been confined to a particular locality by some provision in its charter; but we are not informed that there was any such provision. It is claimed, however, by the plaintiff, that its residence was fixed in Buffalo, the place of its principal office, by the statute (1 R. S., 362, § 6), which provides that "all the personal estate of every incorporated company, liable to taxation on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be; or if such company have no principal office or place

for transacting its financial concerns, then in the town or ward where the operations of said company shall be carried on." This statute does not fix or intend to fix the residence of the corporation, but provides simply for the taxation of its personal estate. What, then, determines the location or residence of a corporation within this State? The provisions of its charter may do so. In the absence of such provisions, its nature, character and mode of operation must determine this. A municipal corporation is confined to its territorial limits. Other corporations are organized to transact business in a particular town or city, and are thus located there, and a railroad which passes through several counties, and occupies lands in several counties for the carrying on of its corporate business, must, at least for the purpose of taxation, be regarded as a resident of each town and county through which it passes. Were it not for the statute above cited, its personal property would be taxed in the same way wherever it was found, not in transit, but for use in its corporate business; and to avoid confusion and uncertainty, and that all its taxable personal property might be reached, the above statute was passed. A corporation, for many purposes, lives, moves and has its being in its agents, and wherever they are in possession of its real estate, carrying on its corporate business, it may be supposed to exist and reside, without departing from legal precedents or violating the spirit or letter of the law.

Hence, I reach the conclusion that the land of the plaintiff, situated in the town of Hamburg, was properly assessed and taxed as resident land, and this conclusion is fortified and sustained by considerable authority (*Mohawk and Hudson Railroad Co. v. Clute*, 4 Paige, 384; *The Albany and Schoenectady Railroad Co. v. Osborn*, 12 Barb., 223; *The People v. The Supervisors of Niagara*, 4 Hill, 20, 25; *The People v. Fredericks*, 48 Barb., 173; *The People v. Beardsley*, 52 Barb., 105, affirmed in the Court of Appeals September, 1869; *The People v. Cussity*, 2 Lansing, 294), and is in conformity with the general and almost, if not quite, uniform practice throughout the State.

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Opinion of the Commission, per EARL, C.

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But there is another answer to this action, as to which I am equally confident.

It is now settled that assessors, in making assessments in all cases where they have jurisdiction, act judicially. (*Swift v. City of Poughkeepsie*, 37 N. Y., 511; *Barhyte v. Shepherd*, 85 N. Y., 238.) This land was situated in the town of Hamburgh, and, hence, the assessors of that town had jurisdiction to assess it. In exercising this jurisdiction, they were to decide not only all questions of fact involved, but also all questions of law. Among other things, they were to determine whether this land was to be assessed as resident or non-resident land, and that was a question of both law and fact. They were to determine the facts, and then whether these facts made it non-resident land. The question of law seems not to be a plain one, as the Supreme Court in the eighth district has decided it one way and the Superior Court of Buffalo the other way. In such a case, it cannot be that the assessors are to determine at their peril. On the contrary, I have no doubt that whichever way they decide they have the immunity of judicial officers; and as they will be protected, all persons who act upon their assessment in enforcing the tax will have equal protection; and the tax, after it has once reached the treasury of the county, can no more be collected back than if it had been placed there as the proceeds of a judgment of a regular court. It seems to me that this is the logical result of the decisions last above cited. Hence, the plaintiff, if it felt aggrieved by the action of the assessors in making this assessment, should have sought a review by certiorari, or in some other mode; and they cannot attack the decision of the assessors, collaterally, and treat it as void, as it must be treated in order to sustain a recovery in this action.

It is also claimed that the assessment was void on account of the defect in the affidavit attached to the roll by the assessors. In *Van Rensselaer v. Witbeck* (7 N. Y., 517), the affidavit of the assessors was held to be so defective as to render the assessment void and the collection of the tax

## Statement of case.

illegal. But that was a case where no presumptions could be indulged. The affidavit showed that the property had not been assessed according to law. In *Parish v. Golden* (35 N. Y., 462), the affidavit of the assessors was not a literal compliance with the statute, and yet the assessment was held valid. The court decided that it was sufficient if the affidavit was a substantial compliance with the statute, and it was the opinion of the judge who wrote the opinion of the court, that unless the affidavit showed affirmatively that the assessors did not comply with the statute in making the assessment of property, it would be presumed that they had complied, and the assessment would be held valid. Without going so far in this case, we may hold that the affidavit, in every important particular, was a substantial compliance with the statute, and hence that the tax was not illegal on account of any informality in the affidavit.

The affidavit of the assessors was properly sworn to before a notary public under chapter 508 of the Laws of 1863.

I am, therefore, of the opinion that the assessment and tax in this case were not void, and that the plaintiff cannot maintain this action.

The judgment of the Special and General Terms should be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

D. WILMOT SCOTT et al., Respondents, v. WILLIAM G. GUERNSEY et al., Appellants.

In construing wills, the law favors a construction that will not tend to the disinheriting of heirs, unless the intention to do so is clearly expressed. That meaning is to be preferred which inclines to the side of the inheritance of the children of a deceased child.

The will of S., after a devise of certain premises to his daughter, P. G., during her life, contained the following clause: "Then to be equally divided amongst her now surviving children, or any of them that may be alive at her decease, or the heirs of any that may be dead at the time of executing this my last will." — *Held*, that the time referred to was the

48	106
100	498
48	106
111	498

48	106
131	490
48	106
140	606

48	106
152	110

48	106
154	286

48	106
161	22



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Statement of case.

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time the will takes effect, by vesting the estate in possession upon the death of P. G. ; that the word "heirs" was used in the sense of children ; and that the intent of the testator was that the children of P. G. should take, if living at her decease, or if any were then dead, leaving children surviving, that the children should take, in place of the parent.

Where, during the existence of the life estate, certain of the devisees of the remainder, with full knowledge of the limited title of the tenant for life, and without the consent of the other remainder-men, erected buildings upon the premises devised, — *Held*, that they were not entitled to any compensation therefor, and, upon partition, could not exact a reimbursement from, or claim a lien upon, the shares of their co-tenants.

The remedy by an action, for rents, by one tenant in common against another, is cumulative, and does not bar the equitable adjustment of them on a partition in equity.

The rents on a partition are a lien upon the shares or interest of any co-tenant from whom they may be due.

Where rents were due from one tenant in common at the time of the death of another, the administrator of the latter is a proper party to an action of partition, as he is entitled to receive the rents due his intestate at the time of his death.

It is a matter of discretion with the court below to direct a sale instead of actual partition, and unless the error is clear, its decision will not be overruled.

(Argued May 19, 1871 ; decided September term, 1871.)

**APPEAL** from judgment of the General Term of the Supreme Court in the sixth district, affirming a judgment rendered upon the decision of the court at Special Term.

The action is for the partition of lands situate in Norwich, Chenango county, and for an accounting as to the rents by certain of the tenants in common. The right of the plaintiffs to bring this action, and the proportions in which they are interested, if at all, depend upon the construction to be given to the last will and testament of William Spier, of Columbia county, N. Y.

The will was executed by the testator in 1821. A codicil was added in October, 1830 ; and he died in 1833.

The following is a copy of the said will and codicil, *viz.* :

"In the name of God, Amen. I, Wm. Spier, of the town of New Lebanon, in the county of Columbia, and State of New York, being weak in body, but of sound mind and

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Statement of case.

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memory, blessed be Almighty God for the same, do make and ordain this my last will and testament, in manner and form following, that is to say : First, I give to my well beloved wife, Lydia Spier, one-third part of my farm on which we now live, together with one-third part of the buildings thereon, and one-third of my movable estate, my horse and pleasure carriage, during her natural life (money, turnpike stock, mortgages and all kinds of obligations), except them, to be divided as hereafter directed amongst my children—having given my eldest son, Joseph Spier, \$2,400, as his share of the first division of my estate—having given my second son, William Spier, \$2,400 as his share of the first division of my estate—having given my third son, James Spier, \$2,400, as his share of the first division of my estate—having given Ezra G. Spier, my fourth son, \$2,400, as his share of the first division of my estate—I give my eldest daughter, Polly Guernsey, in addition to what I have already given her, a lot of land containing thirty-five acres, together with all the privileges and appurtenances thereunto belonging, or in anywise appertaining (except where or any part of the premises, that I have heretofore given a release, or by any means discharged my rite.) The lands lie in the town of Norwich, county of Chenango, State of New York, whereon Peter B. Guernsey now dwells. I will that the above described premises be for the use of my daughter, Polly Guernsey, during her natural life, then to be equally divided amongst her now surviving children, or any of them that may be alive at her decease, or the heirs of any that may be dead at the time of executing this, my last will. I have given my second daughter, Lydia Chichester, \$1,200, as her share of the first division of my estate. I have given my third daughter, Cynthia Lane, \$1,200, as her share of the first division of my estate. I have given my fourth daughter, Manerva Gifford, \$1,200, as her share of the first division of my estate. I give to my three daughters, now living, and to the heirs of daughter Lydia Chichester all my household furniture, two-thirds at my decease, the other third after their mother's decease,

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Statement of case.

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to be divided equally into four equal parts—those daughters living to have one equal part, and the heirs of those not living to have one equal part. Should it so happen, in the course of Divine Providence, that any of my daughters should be dead, and leave no heirs living at the time of executing this, my last will, then their shares to be equally divided amongst the living, or the heirs of those not living. The remaining property I have after my debts and funeral charges are paid, if any, I will should be divided into twelve equal parts—my son Joseph Spier, or his heirs, two ; my son William Spier, or his heirs, two ; my son James Spier, or his heirs, two ; my son Ezra G. Spier, or his heirs, two ; my daughter Polly Guernsey, or her heirs, one ; my daughter Lydia Ohichester's surviving heirs, one ; my daughter Cynthia Lane, or her surviving heirs, one ; my daughter Manerva Gifford, or her surviving heirs, one. I will further, that if it should happen in the course of Providence, that if either of my children should die and leave no heirs of their own body living, at the time of executing this my last will and testament, then I will that their shares shall be divided amongst my surviving heirs as above. I do hereby appoint my beloved sons, Joseph and William Spier, as executors of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof, I have hereunto set my hand and seal, this twenty-fourth day of May, in the year of our Lord one thousand eight hundred and twenty-one.

“WILLIAM SPIER. [L. s.]”

“Signed, sealed, published and delivered by the above-named William Spier, to be his last will and testament, in the presence of us who have hereunto subscribed our names as witnesses, in the presence of the testator.

“JESSE HANDE,

“ALMON TICKNOR,

“ORAN TICKNOR.”

‘I, William Spier, have made my last will and testament, bearing date the 24th day of May, 1821, hereto annexed.

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Statement of case.

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And whereas divers sums of money are due to me from several of my heirs, mentioned in my said will, for which I now hold their different obligations: Now, therefore, by this writing, which I declare to be a codicil to my last will and testament, and to be taken as a part thereof, I do ordain and provide as follows, viz.:

"First. That the sums of money which shall be due to me at the time of my decease, from my sons or daughters mentioned in my said will, or their heirs or representatives, or from the husbands of my said daughters, or from the husband of my daughter Lydia Chichester, deceased, their heirs or representatives, shall be applied to the payment of their respective shares, devised to them by me in my said will and testament, and shall be considered as so much paid them toward the second and last division of my estate.

"Second. The devise to my beloved wife Lydia, made to her in my said will, shall be received by her in lieu of her dower or right to one-third of my real estate after my decease.

"Third. I hereby appoint my son, Ezra G. Spier, an executor of my last will and testament, together with my sons Joseph and William Spier.

"In witness whereof, I have hereunto set my hand and seal, this fourth day of October, 1830.

"WILLIAM SPIER. [L. S.]"

"Signed, sealed, published and declared by the above-named William Spier, as a codicil to be annexed to his said last will and testament, in the presence of

"JOHN BULL, JR., New Lebanon.

"GEORGE G. BULL, New Lebanon."

The judge before whom the action was tried without a jury, in 1860, found that the testator owned the land in fee at his death, and devised it by his said will. That Polly Guernsey and her husband, Peter B. Guernsey, resided at Norwich, and the testator, her father, in Columbia county, when the said will and codicil were executed. That she was about forty-three years of age in 1821, when the will bears

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Statement of case.

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date, and had four children then living, viz., Peter B., Jr., aged twenty-two years; Polly, twenty years; William G., twelve to fourteen years, and Lavinia, several years younger. The eldest, Peter B. Jr., married November, 1825, and died April, 1829, leaving two children surviving, one of whom died in infancy, and the other, Wm. B. Guernsey, in 1849, conveyed all his interest in the premises to the other persons entitled under the said will. Polly Thompson, daughter of Polly Guernsey, married in 1828, and died 1847 intestate, leaving seven children surviving her, four of whom are plaintiffs, and three are defendants herein. In the fall of 1829, Polly Guernsey and her husband visited her father. She died in 1854, and her husband, Peter B. Guernsey, Sen., died in 1843.

The judge found, as conclusions of law, that William G. Guernsey and Lavinia Guernsey, children of the said Polly and Peter B. Guernsey, each owned an undivided third part of the premises in fee, and that the children of Polly Thompson owned the other third in fee and in common; each of her said children owning one-seventh of one-third part of the whole. The judge directed a reference to take an account of the rents and payments by the parties since the death of Polly Guernsey, and to report which of them has been in occupation of any part of the premises, and the value of such occupation, and the time it continued, and to take proof and report, with his opinion, as to the claims of the defendants, William G. Guernsey and James G. Thompson, for buildings and improvements on the premises, and as to title, liens, etc., and as to a sale or actual partition, etc.

The referee reported that William G. Guernsey erected a wooden building for two stores in 1833, and made several additions before the death of his mother, Polly Guernsey, worth, in October, 1861, \$1,500, and increasing the value of the land \$750. That he put on to the premises, in 1841, another building, worth, in October, 1861, \$600, and increasing the value of the land \$200. The ground rent of these buildings, the referee finds, is fifty dollars per annum. That

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Statement of case.

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the buildings were erected under an agreement with the life tenant that the said William G. Guernsey should put up the buildings and have the rents; that he continued to receive the rents under that agreement until the death of his mother in 1854. That the rents so received by him largely exceeded the value of the buildings and the interest on the investment; and the referee states it as his opinion that William G. Guernsey is not entitled to be paid anything for the buildings so erected, and that he was liable for the rents since the death of his mother.

The referee also reported that James Thompson, the husband of Polly Thompson, deceased, in 1850 and 1851 erected a building of the value of \$280, and before the death of Polly Guernsey sold it to James G. Thompson, and that no allowance should be made on account of it. That James G. Thompson made an addition to the said building, in 1857, of the value of \$279, which is a substantial improvement. That he and his partner Lacey, occupied the first mentioned building from January 8, 1854, until August 15, 1857, and during that time the rent was worth \$125 per annum and the taxes; and from that day until the spring of 1860 James G. Thompson occupied it, and during that time that the rent was worth \$240 per year, deducting taxes. That he agreed with Lavinia Guernsey to account for the rent on the final settlement of the Guernsey estate; and he finds and reports as his opinion that James G. Thompson is chargeable with the rent from January 8, 1854 to April 15, 1860, and that the value of the addition erected by him in 1857, and all repairs and taxes paid by him after August, 1857, should be allowed as an offset against said rent. He finds that four of the children of Polly Thompson were minors on the 8th of January, 1854. He reported that actual partition could not be made without prejudice to the parties, and that the premises should be sold in specified parcels. He reported the balance due at the date of his report, August, 1864, from Wm. G. Guernsey for rents, to be \$6,928.18; from James G. Thompson \$1,733.74; from Lavinia Guernsey \$4,971.24, and

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Statement of case.

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several small amounts from the different heirs of Polly Thompson, deceased; all accruing since the death of Polly Guernsey in 1854. Exceptions were taken to the report, and heard at Special Term before the same judge who heard the trial and directed the reference. The report was modified as to the said James G. Thompson, by rejecting the allowance of \$279 for beneficial improvements made by him, and reducing the charge against him for the occupation of a portion of the premises to one-third of the amount, on his agreement with Lavinia Guernsey to pay rent, to whom he was adjudged to be liable for that proportion of the rent or annual value with interest, and the report in all other respects was confirmed. Judgment was entered thereupon for a sale of the premises in specific parcels, and that the sums due for rents as reported be made a charge upon the shares of the parties from whom they were found due; and adjudging that the said William G. Guernsey and Lavinia Guernsey were the owners, each, of an undivided one-third part of the said premises in fee, and that the seven children of Polly Thompson were the owners, each of an undivided one-seventh of one-third part of said premises in fee. The said Wm. G. Guernsey and Lavinia Guernsey excepted to the construction of the said will, giving the said interest to the children of Polly Thompson, and insisting that they were each entitled to an undivided half of the said premises under the said will, to the exclusion of the heirs of Polly Thompson. The said Lavinia raised no question as to the rule adopted in respect to the rents. The defendants, Wm. G. Guernsey and James Thompson, excepted to the decision charging them with the rents and for occupation, and insisted that they should be allowed for their improvements upon the premises. Other objections were also taken, which are referred to in the opinion.

On appeal to the General Term the said judgment was affirmed.

The said William G. Guernsey, Lavinia Guernsey and James G. Thompson thereupon appealed to the Court of Appeals.

## Statement of case.

*D. M. Powers* for appellant Lavinia Guernsey. Words occurring more than once in a will shall be presumed to be used always in the same sense. (2 Jarman on Wills, Perkins' Notes, page 527, note 18; 2 Ch. Cas., 169; 6 Doug., 268; 3 Drew, 472; 2 Redfield on Wills, page 427, note 18.) Where a testator uses an additional word or phrase, he must be presumed to have an additional meaning. (1 Redfield on the Law of Wills, page 427, note 18; 4 B. C. C., 15; 13 Vesey, 39; 7 Taunt., 85.) Possible as well as actual events are to be regarded. (11 Vesey, 457.) To authorize the court to alter the language, they must be able to find, from the context, that which shows to a certainty what are the right words. (1 Jarman on Wills, 418; 3 Paige, 242; 3 N. Y., 539; 4 Brad., 324.) A will only becomes executed at the death of the testator. (*Grimes v. Norris*, 6 Cal., 621.) The word was intended as introducing a substituted gift in case of the first legatee dying in the testator's lifetime. (1 Jarman on Wills, 3d ed., 426; 2 Jarman on Wills, 3d ed., 473; *O'Brian v. Heeney*, 2 Edw., 242.) "Or" is never changed to "and," unless the context of the will favors it, and the general intention is thereby elucidated or promoted. (*Armstrong v. Mason*, 1 Brad., 315; *Holcomb v. Lake*, 4 Zab., N. J., 686.) The court has no right to nullify a clause, unless something in another part of the will shall show that it best comports with the intention of the testator. (1 Redfield on the Law of Wills, page 431, note 14; *Norris v. Beyea*, 13 N. Y., 273, 283; *Chrystie v. Phylfe*, 19 N. Y., 348.) Where a testator uses legal words, he is presumed to employ them in their legal sense. (*Sears v. Shafer*, 1 Barb., 418; aff'd, 2 Seld., 268; *Kingsland v. Rapelye*, 3 Edw., 1; 1 Redfield on the Law of Wills, page 427; Doug. R., 34; 6 Term R., 352; 4 Ves., 329; 5 Ves., 401.) The intent is to be gathered from the word, and is to be carried into effect if consistent with law. (*Howie v. Howie*, 7 Paige, 187, 192; 1 Redfield on Wills, 432, 435, 485; *Horn v. Van Schaick*, 3 N. Y., 538, 544; *Chambers v. Backford*, 18 Ves., 368, 374; *Swinfen v. Swinfen*, 7 Jur., N. S., 89; *Taylor v. Wendell*, 4 Brad., 321. *Church v. Mun-*



## Statement of case.

day, 15 Ves., 396; Willard's Eq. J., 492; 9 Ves., 152; *Crooke v. Lee Vandee*, 9 Ves., 197, 205; *Melish v. Melish*, 4 Ves., 50; *Grey v. Pearson*, 6 Hoff. Law Cases [U. S.], 61.) The law gives effect to a will, although its provisions are unreasonable or unjust. (*Clapp v. Fullerton*, 34 N. Y., 197; *Manigault v. Deers*, 1 Redy Eq., 298; *Segunn v. Segunn*, 3 Keys, 665.) Extrinsic evidence and collateral circumstances are never admissible to control or influence the construction of a will which is founded upon plain language and well settled rules. (*Bunner v. Storm*, 1 Sandf. Ch., 357; *Mann v. Mann*, 14 John., 1; *Wolfe v. Van Nostrand*, 2 N. Y., 436.) The estate did not vest in the children of Polly Guernsey until the decease of the tenant for life. And Polly Thompson having died before the life tenant, the estate never vested in her, and her children never acquired any estate or interest through her. (*Carmichael v. Carmichael*, 4 Keyes N. Y. R., 346; *Hunt v. Hall*, 37 Maine [2 Heath], 333; *Phelps v. Phelps*, 28 Barb., 121.)

*B. F. Rexford* for appellants William G. Guernsey and James G. Thompson. The intent of the testator was that only the children of Polly Guernsey who were then living and survived her should take; and in case of the death of all, then the property to go to their heirs. (*Sturges v. Pearson*, 4 Madd., 411; *Harrison v. Foreman*, 5 Ves., 207; *Mackell v. Winter*, 3 Ves., 536; 1 Roper on Leg., 415.) Every portion of the will should have its proper effect, and the intent of the testator be observed. (*Reeves v. Newenham*, 2 Redy P. C., 36; *Chrystie v. Phye*, 29 N. Y., 348.) "Or" will not be changed to "and," unless it be apparant on the face of the will that the latter was intended. (*Armstrong v. Mason*, 1 Brad., 315; *Gettings v. McDermott*, 2 M. & K., 75; *Harrison v. Bowe*, 3 Jones' Eq. [N. C.], 578; 19 U. S. Digest, 197, § 9; *Chipchase v. Simpson*, 16 Simons, 487; *Girdlestone v. Doe*, 2 Simons, 227.) Where a co-tenant who has not paid his share of improvements seeks partition, the court will so partition as to give the portion improved to him

## Statement of case.

making the improvements, or make the other co-tenants pay for the same. (*Hickcock v. Skinner*, Hoff. 21; *Swan v. Swan*, 8 Price, 518; *Green v. Putnam*, 1 Barb., 500; *Jackson v. Bradt*, 2 Caines R., 302; 1 Story Eq. Juris., §§ 655, 656; *Willard Eq. Jur.*, 701; *Louvalle v. Menard*, 1 Gilm., 39; *Haskins v. Spiller*, 1 Dana, 170; *Brookfield v. Williams*, 1 Green Ch., 341; *Nelson v. Clay*, 7 J. J. Marsh, 141; *Borah v. Archer*, 7 Dana, 176.] The tenant making improvements is not bound to account for its rent, but only for the fair use of the land as he received it. (*Hancock v. Day*, McMullen Ch., 69, 298; *Thompson v. Bostick*, McMull. Ch., 75; *Moore v. Cable*, 1 John. Ch., 385.) And if he supposed he was the owner, he is to have the portion improved set off to him. (*St. Felix v. Rankin*, 3 Edw. Ch. R., 323; *Conklin v. Conklin*, 3 Sandf. Ch. R., 64; *Neesom v. Clarkson*, 4 Hare, 97.) These rules are never changed by the fact that the improvements were put on during the life estate. (*Green v. Putnam*, 1 Barb., 500.) The policy of the law is that the land shall not be sold in a partition suit unless it is absolutely necessary. (2 R. S., 330, § 81; *Smith v. Smith*, 10 Paige, 470; *Clason v. Clason*, 6 Paige, 541; *Van Arsdale v. Drake*, 2 Barb., 599.) If one tenant in common has received more than his share of rents, they may be recovered by a suit, not at common law, but by statute. (1 R. S., 750, § 9; *Woolever v. Knapp*, 18 Barb., 265.)

*Isaac S. Newton* for respondents. Where technical words are used in a will, they may be construed according to their popular and ordinary signification. (*Thomas v. Thomas*, 3 B. & C., 825; 1 Red. on Wills, 464, 688; 3 Barb. Ch., 475.) To effectuate the testator's intention, words and limitations may be transposed, supplied or rejected. (*Prestredge v. Groomsbridge*, 6 Sims., 171; *Pond v. Bergh*, 10 Paige, 140; *Oroner v. Pinckney*, 3 Barb. Ch. R., 475; *Hone v. Van Schaick*, id., 506; *De Kay v. Irving*, 5 Den., 646; 9 Paige, 521; 3 Brad., 280; 3 Brad., 287; 1 Brad., 154.) And the situation of the family considered. (*Wolfe v. Van Nostrand*, 2 Comst., 436.)

## Statement of case.

The intention of the testator is the first great object of inquiry, and to this object technical rules are, to a certain extent, made subservient. (4 Kent's Com., 534, and note *c*; Bacon's Ab., title Wills, *g*, and cases cited; 2 Seld., 420; 3 Comst., 538.) Each clause is to be construed so as to make it valid, if possible. (*Dubois v. Ray*, 35 N. Y., 162; *Chrystie v. Phyfe*, 19 N. Y., 348; 1 Redf. on Wills, 431, 432, 470; *Post v. Hover*, 33 N. Y., 558; *Davis v. Swan*, 4 Mass., 208; *Parsons v. Winslow*, 6 Mass., 208; also 2 Paige, 130; and 3 Brad., 64; Bacon's Abridgment, Wills, *g*, and cases cited in 4, 5, 6 and 7 of Vesey; 40 Barb., 89.) "Or" will be changed to "and," to give meaning to the whole sentence. (*Dubois v. Ray*, 35 N. Y., 171, 172; *Chrystie v. Phyfe*, 19 N. Y. R., 364; *Denn v. Kerneys*, 9 East, 366; *Jackson v. Burhans*, 6 John., 54; *Van Vechten v. Pearson*, 5 Paige, 512; *Roosevelt v. Thurman*, 1 John Ch., 228; *Grim v. Dyar*, 3 Duer, 354; 1 Jarman on Wills, 443, and note 1, citing twenty American cases, read from 1 Jarman, at page 416, in point, and on to 452; 5 Comst., 112; Cro. Jac., 322; 2 Hilliard's Real Prop., 535; 3 Term, 470; 11 Metc., 88.) The heir is not to be disinherited unless the intent to do so is clearly expressed. (1 Redf. on Wills, 4, 5; *Hayden v. Stoughton*, 5 Pick., 536; *Areson v. Areson*, 3 Den., 461; 1 Brad. Rep., 450; *Lynes v. Townsend*, 33 N. Y., 550.) The striking out of words is authorized when inconsistent or meaningless, or in conflict with the general intent. (12 Mass., 537, 542; 22 Maine, 413, 427; *Kane v. Astor's Executors*, 5 Sand., 467; 5 Seld., 113; 1 Jarman on Wills, 420; *Boon v. Comforth*, 2 Ves., 576; *Coryton v. Hilyet*, 2 Comst., 340; 12 East, 515; 9 Ves., 566; *Mason v. Jones*, 2 Barb., 229; *Pond v. Bergh*, 10 Paige, 152, and cases cited; *Arctularius v. Geisenhainer*, 3 Brad., 64.) So words are supplied to effectuate intent. (*Gibson v. Walker*, 20 N. Y., 479; *Covenhoven v. Shuler*, 5 Paige, 130; *Brodhurst v. Brodhurst*, 1 Paige, 343.) Technical words will always yield to carry out testator's design. (*Sherwood v. Sherwood*, 3 Brad., 230; *Burtis v. Doughty*, 3 Brad., 261.) A prior gift not disturbed more than necessary by a posterior

## Statement of case.

qualifying disposition. (*Aroularius v. Geisenhainer*, 3 Brad., 64; 1 Jarman, 165, 414.) Where a life estate is granted to one, and then the estate to be divided amongst others, the latter take a vested estate in fee on the death, to vest in possession when the life estate terminates. (*Dubois v. Ray*, 35 N. Y., p. 168, and refs.; *Brown v. Lyon*, 2 Seld., 419; *Wendell v. Crandall*, 1 Comst., 491; 2 Den., 336; 2 Hill, 254; 4 Hill, 138; 2 Seld., 360; *Carpenter v. Schermerhorn*, 2 Barb. Ch. R., 314; see this case last above; *Ex parte Turk*, 1 Brad., 110; 4 Paige, 336; *Van Wyck v. Bloodgood*, 1 Brad., 154; *Dominick v. Moore*, 2 Brad., 201; *Johnson v. Valentine*, 4 Sand. S. C. R., 36; see this case; 9 Paige, 265; 7 Paige, 187; 2 John., 288; 12 Wend., 83; 5 Paige, 512; 25 Wend., 119; 22 Barb., 195.) A future interest in lands, which can take effect as a contingent remainder, shall never be taken as an executory devise. Nor will a remainder be held contingent when it can be taken to be vested. (*Dubois v. Ray*, 35 N. Y., 168; *Johnson v. Valentine*, 4 Sand. S. C. R., 36; *Wolfe v. Van Nostrand*, 2 Comst., 436; Butler's Fearn, 387, and note; see numerous cases cited on page 522 of 5 Sand. S. C. R., and also 1 Bennett & Heard, Mass. Dig., 424; *Kane v. Astor's Executors*; *Parsons v. Lyman*, 4 Brad., 268; 9 Cush., 516; 5 Mass., 535.) The Thompson children take as purchasers, not as heirs, and each has an equal share with William G. and Lavinia. (Redf. on Wills, 487; *Lee v. Lee*, 16 Abb., 127; *Eccard v. Brooke*, 2 Cox, 213; *Horridge v. Ferguson*, Jacob, 583; 1 Jarman, 452; *Baistoro v. Goodwin*, 2 Brad., 416; *Crosby v. Clare*, Amb., 397; *Butler v. Stratton*, 3 Bro. C. C., 367; *Dominick v. Sayre*, 3 Sand. S. C. R., 565.) In partition, a question arising on construction of a will may be void. (*Warfield v. Crane*, 4 Keyes, 448; *Beach v. Cooke*, 28 N. Y., 508; 15 N. Y., 617; 13 How., 476; 9 Cow., 530; 5 Den., 285.) One tenant in common cannot make improvements and recover for them. (*Putnam v. Ritchie*, 6 Paige, at p. 405; *Mumford v. Brown*, 6 Cow., 475; 2 Caines' R., 303; *Taylor v. Baldwin*, 10 Barb., 590; S. C., affirmed, 10 Barb., 626; *Putnam v. Ritchie*, 6 Paige, 404, 405; *Matter of Heller*, 3

## Opinion of the Commission, per LEONARD, C.

Paige, 199.) If entitled to improvements, he must account for rents of the property as improved. (*Rasspass v. Breckinridge*, 2 A. K. Marsh, 581.) One tenant in common assuming to receive rents receives them for the others, not in a body, but each one's share for the person entitled. (*Hall v. Fisher*, 20 Barb., 446; *Hannan v. Osborn*, 4 Paige, 336.) Such a claim draws interest. (*Van Rensselaer v. Jewett*, 2 Comst., 135, 140; see brief of Hill in same, p. 138, and references; 1 Ker., 80; 15 N. Y. R., 399; 20 N. Y. R., 14; *Stoughton v. Lynch*, 1 John Ch. R., 467; *People v. Gashierie*, 9 John., 71; 7 Wend., 109; 5 Cow., 587; 2 Wend., 413; 12 How. Pr. R., 523; 4 John., 183; *Selleck v. French*, 1 Conn., 32; see 1 American Leading Cases, 343, 347, 351, 360; *Utica Ins. Co. v. Lynch*, 11 Paige, 520.) James Thompson's occupancy was not for the benefit of his children. (*Woolever v. Knapp*, 18 Barb., 265.) The excess of rents received is a lien on the share of the one receiving. (*Hannan v. Osborn*, 4 Paige, 343; *Warfield v. Crane*, 4 Keyes, 448; *Brede v. Lathrop*, 22 N. Y., 535.) An accounting in these cases not only can be had, but is usual. (See *Hannan v. Osborn*, 4 Paige, at pp. 342, 343; *Bullwinker v. Ryker*, 12 Abb., 311; Hoff., 21; 1 Barb., 500; 11 How., 489; 2 B. Ch., 399.) This lien is not cut off or affected by any subsequent lien. (*Keirsted v. Avery*, 4 Paige, 9; *Matter of Howe*, 1 Paige, 125; 2 Paige, 217; 2 Barb. Ch., 165.)

LEONARD, C. The title which the parties to this action claim to derive under the last will of William Spier demands the judicial construction of a single paragraph. It is as follows, viz.: "I will that the above described premises be for the use of my daughter, Polly Guernsey, during her natural life, then to be equally divided amongst her now surviving children, or any of them that may be alive at her decease, or the heirs of any that may be dead at the time of executing this my last will."

The whole instrument indicates unmistakably that it was prepared by a person who had but little acquaintance with

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Opinion of the Commission, per LEONARD, C.

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the correct use of legal terms relating to his subject, and disregarded the grammatical construction of his sentences, and the arrangement of language to convey his ideas with certainty. The intention of the testator is not, however, in the least degree doubtful to my mind. It is his clear intention that his daughter Polly shall enjoy the property for her life, remainder to her children, with the right of representation in case any of them died before her. It will be unprofitable to discuss the rights of children of Polly Guernsey, born after the publication of the will, because none were born. She had four children at that time—two sons and two daughters—and none were born to her afterward. One of her sons, Peter B., died in the lifetime of the testator, and before he made the codicil, leaving issue, two children, one of whom, a son, is still living; the other died in infancy.

. One of the daughters of Polly Guernsey married James Thompson, and died in the lifetime of her mother, leaving lawful issue, seven children, all of whom survived Polly Guernsey, their grandmother, and are parties to this action, claiming one-third of the premises devised by the will of William Spier, as the representatives of their mother, Polly Thompson. William G. Guernsey and Lavinia Gurnsey, a son and daughter, who only of the said four children of Polly Guernsey were living at the time of her death, claim the whole estate under the will of William Spier, to the exclusion of the children of their deceased brother, Peter B., and of their sister, Mrs. Thompson. They insist that the last member of the sentence quoted above from the will must be treated as senseless and nugatory, or that, if retained, the word "executing," in that sentence, must be held to relate to the time of signing the will by the testator. There is authority for rejecting words and even sentences from a will where the plain intention of the testator is thereby promoted or carried into effect. The chief and only object of judicial construction, when applied to a will, is to ascertain and determine the intention of the testator. It is desirable to give effect to the language rather than to reject or annul

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Opinion of the Commission, per LEONARD, C.

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it. The law favors a construction which will not tend to the disinheriting of heirs, unless the intention to do so is clearly expressed.

There is no reason apparent from the facts proven in this case, nor from the expressions and meaning of the language of the testator, that he intended to disinherit the children of any deceased son or daughter of Polly Guernsey. It will require a very artificial rendering of the will to arrive at any such conclusion. That meaning is to be preferred, if the case were balanced, which inclines to the side of the inheritance of the children of a deceased child. We can see no reason why the testator should prefer William G. and Lavinia to Peter B. and Polly, and their respective children in case of their death.

We unhesitatingly pronounce, in this case, against the application of the rule for annulling the last member of the sentence referred to, not only for reasons before mentioned, but for others, hereinafter to be mentioned, which attribute to that sentence an important sense and meaning.

The learned court from which this appeal has been taken arrived at the intention of the testator, or the expression of that intention, by changing the word "or" to "and," in the last two members of the sentence under examination. This rule of construction is also well sanctioned by authority, where the intent is not doubtful. There is no actual necessity for the alteration of any word. The same result will follow by repeating the word "amongst" after the first "or," as it is plainly there to be understood or implied, and holding that the word "executing," in the last member of the sentence, refers to the time when the will takes effect, by vesting the estate in possession, at the death of Polly Guernsey. The sentence, so amended, after the creation of the life estate, will be read as follows: "Then to be equally divided amongst her now surviving children, or '*amongst*' any of them that may be alive at her decease, or the heirs of any that may be dead at the time of executing this my last will." The last "or," here used, puts "the heirs of any that may be dead"

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Opinion of the Commission, per LEONARD, C.

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as an alternative in the place of deceased children. The persons who are to take the remainder in possession are children, or the heirs of deceased children. This construction gives the last "or" the same signification that "and" would have, if there used. The testator has used the word "heirs" in the sense of children. He has not reflected that this word might include persons other than children, and the result has not disappointed his expectation. The heirs of his granddaughter, Polly Thompson, have proved to be her children.

Whether the sentence be read as above indicated, or by changing the word "or" to "and," it will conform to the undoubted intention of the testator, that the children of his daughter, Polly, should take, if living at her decease, or if any of them were then dead, leaving children surviving, that the children should stand in the place of the parent. The testator has employed the word "executing" in a like common or vulgar sense as he has the word "heirs." He refers to the time when the estate vested in fee by the death of his daughter, Polly. The will then became fully executed as to these heirs and this property. If the word "executing" be held to refer to the date or time of signing, it would be singularly inappropriate and unnatural, for Polly Guernsey's children were then all living, and none of them were married or had any children. The husband of Polly Guernsey was then living, and might have taken as heir of a deceased child, under such a construction. It cannot be supposed that the testator had any such intention. It is possible that the testator ignorantly believed that his executors had something to do about "executing" the will, as to this land as well as to the "movables" of his estate, and that he referred to the time of the execution of their duties. Whether it refers to the time of the death of the testator, or of Mrs. Guernsey, as the time of executing the will, it is equally effectual to save the inheritance of the mother's share to the children of Polly Thompson.

The Supreme Court held that the tenants who erected buildings on the land were not entitled to any compensation



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Opinion of the Commission, per LEONARD, C.

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therefor; and this is also alleged to be error. The buildings were constructed during the life estate of Mrs. Guernsey, with full knowledge of the limited nature of her title. It has not been claimed that they were erected under any mistake as to the extent of her title or right. The consent of the others, having estates in remainder, was not asked, nor were any of them invited to contribute or join in the enterprise. The buildings were erected as a venture. It was hoped that they would return the investment with a profit; and there is nothing to indicate that William G. Guernsey or the Thompsons relied upon any moral or legal obligation that any one of their co-tenants should ever pay any portion of their expenditures.

The case of *Green v. Putnam* (1 Barb. S. O. R., 500) is the strongest authority for the appellants, and the most relied on by them to sustain their claim for compensation. The claim was allowed in that case, as an equitable lien, to be adjusted by the court in partition, on very good grounds. The plaintiff had been consulted, and had consented to the construction of a smaller building, and, when it was ascertained that a larger one was being constructed, objected. The lien in favor of the party who expended the money, or his assignee or grantee, was limited to the sum necessary for erecting the smaller building, and no relief was granted for the amount expended without the plaintiff's consent. As to such expenditure, it was a venture; it might be successful, or otherwise, but it gave no right to exact a reimbursement, or to claim a lien upon the share of the other parties. In *Putnam v. Ritchie* (6 Paige, 390), the building was erected under a mistake as to the title.

In *re Heller* (3 Paige, 199), the court exercised the equitable power of chancery over the estate of an idiot, to pay the damage sustained by his co-tenant for the wanton destruction of a building belonging to them in common. In *Conklin v. Conklin* (3 Sandf. Ch. R., 64), the improvements were made under a mistake as to the title.

There was no consent, mistake or other equitable ground in this case for relieving a party who made his investment

with full knowledge of the facts, voluntarily, and without any inducements offered by other co-tenants. Had the appellants offered to share their rents, upon being paid a due proportion of the value of the improvements after the termination of the life estate, it might have afforded a better ground to claim compensation. The appellants are not within the reason of any of the adjudged cases, where relief has been granted in partition for money expended in improvements by one of several tenants in common. If the land has been really enhanced in value by the improvements, the appellants are in better plight than strangers, as they will receive their *pro rata* share of the increased proceeds of the sale. The owner cannot be called upon to afford any indemnity or compensation for money expended by a stranger for improvements, if he had full knowledge of the risk he was encountering when they were made.

Wm. Guernsey erected the buildings, not as himself having any interest in the property, but on a special agreement with the tenant for life. The arrangement was a favorable one to him, and he received full compensation for his expenditures. When the life tenant died, the property as it stood, with the buildings on it, belonged to the heirs. He continued to occupy, knowing all the facts, and must pay the full value of his occupation.

The remedy for rents, by one tenant in common against another under the statute, by an action, is cumulative, and does not bar the equitable adjustment of them on a partition in equity. (1 R. S., 750, § 9.) The rents, on a partition, are a lien upon the shares or interest of any co-tenants from whom they may be due.

The objection that D. Wilmot Scott has been improperly added as a party to the action, as administrator of his deceased wife, who was one of the children of Polly Thompson, is not well taken. He, as administrator, is entitled to receive the rents due to his wife at the time of her death, and is, for that reason, a proper party to the accounting. It is not necessary

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Statement of case

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that he should be turned over to an action under the statute for their recovery.

It appears from the complications arising from infancy, minuteness of some of the shares, difference in value of the lands, and the liens for rent on the shares of some of the parties, that an actual partition could not be made without prejudice to the rights of some of them. The decree provides for sales in small parcels, which will enable any of the parties to purchase to the extent of their respective shares or interest in the whole proceeds. There is no error in this respect. It must be presumed also, that the court below exercised its best discretion in providing for a sale, instead of an actual partition, which we ought not to overrule unless the error is clear. The judgment should be affirmed with costs.

All concur.

Judgment affirmed. ✓

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WILLIAM RUHL, Respondent, v. CATHARINE A. PHILLIPS,  
Executrix, etc., et al., Appellants.

The sale of the entire effects of an insolvent copartnership upon credit, at a fair valuation, to a responsible vendee having knowledge of the insolvency, is not *per se* fraudulent. Although made by the vendor with intent to hinder, delay and defraud creditors, that does not affect the title of the purchaser, unless he had previous notice of the fraudulent intent.

(Argued May 19, 1871; decided September term, 1871.)

THIS is an appeal by the defendants, Phillips and Many, from an order of the General Term of the New York Common Pleas reversing a judgment in their favor, entered on the report of a referee, and ordering a new trial.

The action was brought by the plaintiff as a judgment creditor of the defendants Many & Lewis, partners in the jewelry business, after the return of an execution on his

## Statement of case.

judgment unsatisfied, for the purpose of setting aside a bill of sale to John B. Phillips (who was the original defendant) of all their property, on the ground that it was made by all the parties thereto with intent to hinder, delay and defraud the plaintiff and other creditors of the said Many & Lewis in the collection of their lawful demands against them.

The defendants Phillips and Many answered the complaint, controverting the allegations of fraud and claiming that the said sale was made in good faith, and for a good and adequate consideration paid therefor.

The defendant Lewis did not appear in the action. The issues joined therein were referred to Lewis B. Woodruff, Esq., as sole referee to hear and determine the same. He subsequently made his report in favor of the defendants. The judgment entered thereon was, on appeal to the General Term, reversed and a new trial ordered. In the judgment of reversal, it is "adjudged that the sale and transfer to the defendant, John B. Phillips, referred to in the pleadings, was, in fact, made with the intent to hinder, delay and defraud the creditors of the firm of Many & Lewis, and upon that question, among others, the aforesaid judgment of the General Term is reversed." The facts, so far as they affect the decision in this court, appear in the following opinion :

*Marsh & Wallis* for appellants. The finding of the referee, that the sale was not made with intent to hinder, delay or defraud creditors, is fully sustained by the evidence and the law. (*Hanford v. Artcher*, 4 Hill., 39; *Boskins v. Shannon*, 3 Coms., 310; *Purchase v. Mattison*, 3 Bos., 310; *Cunningham v. Freeborn*, 11 Wend., 241, 250.) The intent of the parties is what constitutes the fraud. (*Seymour v. Wilson*, 4 Kern., 567; *Waterbury v. Sturtevant*, 18 Wend., 353, 365.) The fact that P. knew of the insolvency of M. & L. is not evidence of fraudulent intent on his part. (*Waterbury v. Sturtevant*, 18 Wend., 353, 365; *Beals v. Guernsey*, Johns., 348, 352; *Rigney v. Talmadge*, 17 How., 556; *Mabbett v.*

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Opinion of the Commission, per LORT, Ch. C.

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*White*, 2 Kern., 456.) A debtor by assignment may secure an existing indebtedness, though not yet matured. (*Cunningham v. Freeborn*, 11 Wend., 241, 250.) An insolvent firm may transfer all the partnership property to a creditor or creditors to pay their demands, though they thus gain a preference over the other creditors. (*Egbert v. Wood*, 3 Paige, 517; *Mabbett v. White*, 2 Kern., 442.) In cases of this nature the question of fraudulent intent is a question of fact, and not of law. (3 R. S., 5th ed., 225, § 4; *Woodin v. Foster*, 16 Barb., 146; *Brooks v. Christopher*, 5 Duer, 216, 219; *Stuart v. Taylor*, 7 How., 251, 253; *Durkee v. Mott*, 8 Barb., 423, 425.)

*John J. Townsend* for respondent. An assignment for the benefit of creditors, authorizing a sale of the property on credit or an assignment by an insolvent firm, directing the effects of the firm to be applied in payment of an individual debt of a partner, is in violation of the statute, and furnishes conclusive proof of a fraudulent intent. (*Nicholson v. Leavitt*, 6 N. Y., 510; *Barney v. Griffin*, 2 N. Y., 365; *Kellogg v. Slawson*, 11 N. Y., 302; *Wilson v. Robertson*, 21 N. Y., 589; *Meacham v. Sternes*, 9 Paige, 405; *Browning v. Hart*, 6 Bar., 93; *Litchfield v. Pelton*, 6 Bar., 187; *Mills v. Carnly*, 1 Bos., 159; *Kepner v. Burkhard*, 5 Barr., Pa. R., 478; *Vance v. Phillips*, 6 Hill, 433; *Loeschick v. Baldwin*, 38 N. Y., 326; *Putnam v. Hubbell*, 42 N. Y., 106.) The attempt by an insolvent to avoid the obligation of immediate payment, or extend the period of credit, is fraudulent in law. (*Nicholson v. Leavitt*, 2 Seld., 510; *Dunham v. Waterman*, 17 N. Y., 17.)

LORT, Ch. C. The facts in this case did not warrant the reversal by the General Term of the judgment entered on the report of the referee. It is a general rule that the verdict of a jury and the findings of a referee on questions of fact should not be set aside, if there is any testimony to sustain them, unless they are clearly against the weight of evidence.

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Opinion of the Commission, per LOTT, Ch. C.

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It is conceded, in the opinion of the presiding judge at the General Term, that the special facts found by the referee were correctly found, and he stated that their correctness was not disputed by either party; but he came to the conclusion that they were "not competent in law to establish or warrant the finding that there was an absence of any fraudulent intent, but that, in his judgment, they established directly the contrary, for two reasons," which he states as follows: "1st. The sale was of the entire effects of an insolvent copartnership, upon a credit of from four to twenty-four months, the necessary effect of which was to postpone the payment of the creditors until the expiration of the term of credit, as well as to make the ultimate discharge of the copartnership debts dependent upon the pecuniary ability of the purchaser to pay the notes given by him as they respectively fell due, and was thus an act to hinder and delay creditors; and, 2d. Because there was an understanding between the parties, coterminously with the sale, that the purchaser was to pay individual debts of one of the copartners, to secure him in doing which, \$5,000 of the notes received upon the copartnership effects were handed back to him, to be appropriated by him in part in this way."

The first of those reasons was involved in the decision by the Court of Appeals of the case of *Loeschigk v. Bridge* (42 N. Y. Rep., 421), and it was there held that the mere fact of a sale, by a party in failing circumstances, of his property, to a purchaser having a knowledge thereof, to an amount more than double of that sold in this case for his notes, payable at an average credit for sixteen months for the whole of the purchase-money, except \$1,000 paid in cash, does not *per se* establish fraud, or a fraudulent intent to hinder, delay or defraud the creditors of the vendor.

The second reason is based on an error of fact. The understanding between the parties therein mentioned was not made coterminously with the sale, which took place on the 21st day of May, 1861, whereas the said understanding was, as found by the referee, made on or subsequent to the twenty-second day of that month.

That finding is sustained by the testimony, and is conformable to the thirty-third item in the request of the plaintiff's counsel to find certain facts which he claimed to have been proved, and it is assumed to be correct by him in his points on this appeal.

The individual debts of one of the copartners, provided for by that understanding, amounted to \$214, and the notes for \$5,000, that were given back to Phillips for the purpose of securing him, were not only for that debt, but for several firm debts which he agreed to pay, and also as security for his indorsement of certain notes of the firm for upward of \$1,500, which he had indorsed for their accommodation.

The conclusion of the learned judge that the transaction was fraudulent, for the two reasons above stated, was based on and resulted from his application of the principles of law applicable to assignments in trust for the benefit of creditors prohibiting sales of the assigned property on credit, and the appropriation of partnership effects to the payment of individual debt of one of the partners, to the prejudice and loss of creditors of the firm. He said: "It can make no difference whether the sale of the whole of the effects of an insolvent copartnership upon credit, or the application of partnership effects to the payment of the individual debt of a partner, is accomplished by the creation of a trust, or by a direct sale to a purchaser, as in this instance. The effect in both cases is the same, to hinder and delay creditors, and what would be fraudulent in one form is equally so in the other." A material distinction between the two cases is overlooked. In the first case the transfer is voluntary and without consideration. Its effect is, moreover, to divest the assignor of all legal interest in and control over the proceeds of the assigned property, and the assignee, although vested with the legal title thereto, holds it subject to the trusts declared in the assignment, and no creditors, except those provided for therein, can claim any benefit therefrom, and their rights are fixed and regulated by the terms of the trust, and if they prescribe a sale on credit, the collection by the creditor of his claim is necessarily postponed

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Opinion of the Commission, per LOTT, Ch. C.

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until the expiration of the credit allowed. In the case of a sale, there is a consideration passing to the vendor from the purchaser, who becomes the owner in his own right of the property, and the vendor, while parting with the property, obtains the purchase-money therefor. This, whether paid in cash or in notes, is his property, and although it cannot in either case be reached by an execution, it is nevertheless liable to the claims of creditors and can be reached by an appropriate action, or by the more summary proceedings supplementary to execution now authorized by the provisions of the Code.

If the avails are in notes or other securities, they can, under the order of the court, be converted into money, and be made immediately available in satisfaction of the debt sought to be collected.

There is, also, this material consideration, which has been overlooked as applicable to a sale. Although it may have been made on the part of the vendor with the intent to hinder, delay or defraud his creditors, yet that fact does not in any manner affect or impair the title of a purchaser for a valuable consideration unless it appears that such purchaser had a previous notice of the fraudulent intention of his vendor or of the fraud rendering his title void.

The facts found by the referee show, among other things, that the transaction in question was an absolute sale, without any trust express or implied, or any agreement at or previous to the sale as to the disposition of the proceeds, except so far as to provide that the debts due to or agreed to be paid by Phillips the purchaser should be allowed in part payment of the purchase-money, and he was to be secured against liabilities for or on account of his indorsements. The consideration he agreed to pay was adequate, or at all events not so far under a liberal valuation as to raise any presumption of fraud on that account, and he was of sufficient means and responsibility to make the purchase and the terms of credit appear to have been fixed so as to secure the payment of the notes he gave for the purchase-money when they fell due.

The amount of the notes was not sufficient to pay all the



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Opinion of the Commission, per LOTT, Ch. C.

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debts of the firm, and it was the object of Many, the member thereof who made the sale, to prefer certain of their creditors, including a copartnership (of Many, Baldwin & Many), in the payment of debts due to them, and to indemnify them against liability on indorsements made for their accommodation. This object, although known to Phillips at the time of his purchase, did not render it fraudulent as against the plaintiff or any of the creditors who were not to be so preferred. A debtor, notwithstanding his insolvency, is allowed to make such preference, if *bona fide*, and a sale for that purpose is not invalid.

It appears that one of the debts which Many wished to secure was a note made or indorsed in the firm name of Many & Lewis for the private debt of Many himself, and indorsed by the said copartnership of Many, Baldwin & Many; but I infer, from what is stated relative thereto, that it was valid and obligatory on the firm, and properly chargeable against it. But if it was otherwise the fact cannot affect Phillips, the purchaser. It is not found by the referee, nor is it claimed that he had any knowledge or notice, at the time of his purchase, of the origin or consideration of that note, or the purpose for which it was given.

I will only add, that on a careful examination of the facts found by the referee (and they are presented by his findings as favorably to the plaintiffs as the testimony warranted), I am brought to the conclusion that there was no sufficient ground for the reversal by the General Term of the judgment entered on his report, either on the ground of error upon the questions of fact or of law involved in the case.

It follows that the order of reversal should be reversed, and that the original judgment must be affirmed with costs of the appeals to the General Term and to this court.

All concur.

Judgment accordingly.

## Statement of case.

48	182
109	236
48	139
124	266
124	271

OTIS D. BREESE et al., Appellants, v. UNITED STATES TELEGRAPH COMPANY, Respondent.

Although telegraph companies, organized under the general laws of this State and the acts amendatory thereof (chapter 265, Laws of 1848 ; chapter 559, Laws of 1855, etc.), may be termed common carriers in the sense that they are engaged in a public employment and bound to transmit all messages, the common-law liability of common carriers does not attach to them. They do not insure the safe and accurate transmission of messages. They are bound to transmit them with care and diligence adequate to the business which they undertake.

They have the right to make reasonable rules for the conduct of their business, and can limit their liability for mistakes not occasioned by gross negligence or willful misconduct, by notice brought home to the sender of the message or by special contract.

Where the blanks furnished by the company, upon one of which the message was written, had been for some time in the possession of the sender, which blanks contained an agreement between the signer and the company that the company would not be responsible for any error in the transmission of the message, unless it was repeated.

*Held*, it must be presumed that the sender understood the contents of the blank and accepted the terms, and he is estopped from denying or disputing the agreement.

A contract voluntarily signed and executed by a party, in the absence of misrepresentation or fraud, with full opportunity of information as to its contents, cannot be avoided upon the ground of his negligence or omission to read it, or to avail himself of such information.

(Argued May 19th, 1871 ; decided September term, 1871.)

APPEAL from judgment of the General Term of the Supreme Court, in the seventh judicial district, in favor of defendant, rendered in a case agreed upon and submitted for determination without action, under section 372 of the Code of Procedure. The facts and the opinion of the court thereon, are fully reported in 45 Barbour, 274, etc.

The facts material to the decision of this appeal are these : George W. Cuyler, the president of the First National Bank of Palmyra, acting for and by authority of the plaintiffs, on the 16th of March, 1865, presented to the defendant, a corporation duly incorporated under the general law

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Statement of case.

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of this State providing for the incorporation and regulation of telegraph companies, a dispatch or message for transportation, directed to Cammaan & Co., No. 56 Wall street, New York, to whom it was addressed in the following terms: "Buy us seven (\$700) hundred dollars in gold. Geo. W. Cuyler, Pt." It was duly transmitted from the office of the defendant, at Palmyra, but by error of some of its operators working between Palmyra and New York—the precise cause of which is unknown—it was received in New York and sent and delivered to Messrs. Cammaan & Co., as follows: "To Cammaan & Co., No. 56 Wall street, New York. Buy us \$7,000 in gold. Geo. W. Cuyler, Pt." They, immediately on its receipt, purchased \$7,000 in gold coin at the then market price. After the error was discovered, the defendants were notified of its occurrence and the gold was afterward resold at the best market price, resulting in a loss to the plaintiffs of \$1,244.25, on the refusal of the defendants to accept it on a tender; the plaintiffs having accompanied the tender with a notice that if it was not accepted it would be sold in the public market at the highest price that could be obtained therefor, and the defendants held liable for the loss.

The said dispatch or message was written by Mr. Cuyler upon an ordinary blank of the defendant, taken by him from a lot of blanks he had on hand at his office, which (to secure business) had been left there by the defendants; but he or the plaintiffs had never read the printed part thereof.

This blank contains, among others, the following provisions: "In order to guard against errors or delays in the transmission or delivery of messages, every message of importance ought to be repeated, by being sent back from the station to which it was directed to the station from which it was sent and compared with the original message. Half the tariff price will be charged for this repeating and comparing. And it is hereby agreed between the signer or signers of this message and this company, that this company shall not be held responsible for errors or delays in the transmission or delivery of this message, if repeated, beyond the amount of fifty dol.

## Statement of case.

lars, unless a special agreement for insurance be made and paid for at the time of sending the message, and the amount of risk specified in this agreement; and that in case this message is not repeated, this company shall not be held responsible for any error or delay in the transmission or delivery of same beyond the amount paid for transmission, unless specially insured, and the amount of risk paid for and specified in this agreement at the time, nor shall this company be held liable for errors in cipher or obscure messages."

It then contains some other provisions, one of which is that no one but the superintendent is authorized to make a special agreement for insurance, and at the end thereof is the following direction :

"Send the following message, subject to the above conditions and agreement;" and immediately beneath it was the dispatch or message above set forth.

Mr. Cuyler paid for its transmission the fee charged by the defendant, but did not pay for or request to have the same repeated; and the case does not show what the fee paid was.

The plaintiffs claimed, on the above facts, to recover of the defendant the sum of \$1,244.25, the amount of their loss, with interest thereon from the 16th day of March, 1865; but the court decided against their claim, and rendered judgment for the defendant, with costs.

*Charles McLouth* for appellant. The defendant is a private corporation. (*Dart. Coll. v. Woodward*, 4 Wheat., 518-562; *Morey v. Newfane*, 8 Barb., 645; *Tinsman v. Belvidere and D. R. R. Co.*, 2 Dutcher [N. J.], 148; *U. S. Bank v. Planters' Bank*, 9 Wheat., 904.) The liabilities of private corporations the same as individuals. (2 Dutch., 148; *West v. Brockport*, 16 N. Y., 161; *Jones on Bailment*, 140; 2 Kent's Com., 780.) Defendant responsible for the competency, accuracy and fidelity of its servants. (41 N. Y., 571, 572; 54 Barb., 519; *Dunning v. Roberts*, 85 id., 467.) Defendant liable as common carriers. (2 Kent's Com., 828; *Harcraft v. G. N. R. R.*, 8 Eng. L. & E., 362; *Orange Bk.*

## Statement of case.

v. *Brown*, 3 Wend., 161; *Dow v. N. J. Steam Nav. Co.*, 1 Kern., 492, 493; *De Rutte v. N. Y. A. and P. Tel. Co.*, 1 Daly, 547; Story on Bailments, § 2; Jones on Bailments, § 137; 2 Kent's Com., 112; 18 Cal., 422; 1 Am. Law Reg., 485; 33 Eng. L. & E., 180; 2 Pars. on Contracts, 251; 35 Penn., 298; 32 Barb., 580; *Watz v. W. U. Tel. Co.*, 62 Pa., 83; 54 Barb., 125, 136.) The company cannot limit its liability in case of negligence. (*Wells v. Steam Nav. Co.*, 8 N. Y., 379; *Prentice v. Decker*, 49 Barb., 21-31; *Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S., 344-382; *Birney v. N. Y. and Wash. Tel. Co.*, 18 Md., 341; *Guiliane v. Ham. and Am. Packet Co.*, 42 N. Y., 212; *Smith v. N. Y. C. R. R.*, 24 id., 225; Angell on Com. Carr., §§ 267-275; Scott & J., Tel. Law, §§ 140-260; *Wolf v. W. U. Tel. Co.*, 62 Pa., 83.) Except by express contract, it cannot be limited at all. (*Bissell v. N. Y. C. R. R. Co.*, 25 N. Y., 445; *Dow v. Steam Nav. Co.*, 11 id., 485; *Baldwin v. U. S. Tel. Co.*, 1 Lansing, 136.) Public policy precludes defendant from limiting its liability as attempted. (*Merrill v. Earle*, 29 N. Y., 215; *Coggs v. Bernard*, 2 Ld. Ray., 909; *Bryant v. Am. Tel. Co.*, 1 Daly, 575; *Birney v. N. Y. and W. Tel. Co.*, 18 Md., 341.) The signing the paper did not make an express contract. (*Weller v. N. Y. C. R. R.*, 24 N. Y., 183; Story on Con., § 378; *Wolf v. W. U. Tel. Co.*, 62 Pa., 83.) The error is negligence. (*Rittenhouse v. Ind. Tel. Co.*, Com. of Appeals, 1871.) The burden was upon defendant to show mistake happened without negligence. (*Leonard v. N. Y. Tel. Co.*, 41 N. Y., 565.) As to rule of damages, see *Rittenhouse v. Ind. Tel. Co.*, Com. of App., 1871; *Leonard v. N. Y. Tel. Co.*, 41 N. Y., 544; *Baldwin v. U. S. Tel. Co.*, 1 Lansing, 125; *Hobson v. Wash. Tel. Co.*, 15 Grattan [Va.], 122; *Parks v. Cal. Tel. Co.*, 13 Cal., 442; *Stevenson v. Montreal Tel. Co.*, 16 W. Canada, 530; *Griffin v. Colver*, 16 N. Y., 494; Sedg. on Damages, chap. 3.)

*G. P. Lowery* for respondent. Even if defendant is liable as a common carrier, it is not liable here. (*Clarke v. R. & S.*

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Opinion of the Commission, per LOTT, Ch. C.

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*R. R. Co.*, 4 Kern., 572; *Boyce v. Anderson*, 2 Pet. S. C., 150.) The blank used constituted a binding agreement. (*Lewis v. G. W. R. Co.*, 5 H. & M., 865; *Wolf v. Western Union Tel. Co.*, 62 Pa. Rep., 87; *Western Union Tel. Co. v. Carew*, 16 Mich., 525, 536; *Ellis v. American Tel. Co.*, 13 Allen, 226, 235, 1866; *Wann v. Western Union Tel. Co.*, 37 Mo., 480, 1866; *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433, 1869; *Bissell v. N. Y. C. R. R. Co.*, 25 N. Y., 442.) The blank is valid as a regulation, if not as an agreement. (Laws of 1848, ch. 265, § 11; *McAndrews v. The Electric Tel. Co.*, 33 Eng. L. and Eq. R., 180; *Birney v. N. Y. and Wash. Tel. Co.*, 18 Maryland, 357; *Camp v. Western Union Tel. Co.*, 1 Metcalfe [Ky.] R., 164; *Ellis v. American Tel. Co.*, 13 Allen, 226, 235, 236, 1866; *Western Union Tel. Co. v. Carew*, 16 Mich., 536; *Gildersleeve v. U. S. Tel. Co.*, 29 Maryland, 232, 1868.) Defendant only liable for negligence or want of skill, which must be shown affirmatively. (*Leonard v. N. Y. & B. Tel. Co.*, 41 N. Y., 571, HUNT, J., and p. 576, WOODRUFF, J.; *Ellis v. American Tel. Co.*, 13 Allen, 232; *Western Union Tel. Co. v. Carew*, 16 Mich., 536; *Birney v. N. Y. and Wash. Tel. Co.*, 18 Md., 357; 2 Parsons on Cont., 5 ed., p. 133; *Platt v. Hibbard*, 7 Cow., 501; *N. J. Steam Nav. Co. v. Mer. Bank*, 4 How. U. S., 384; *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433.)

LOTT, Ch. C. The questions involved on this appeal do not, as stated by the appellants' counsel, "take a wide range," but are, by the facts detailed in the case, reduced to a narrow compass. It is therein stated that the defendants are a corporation duly incorporated under the laws of the State of New York, and engaged in the business of transmitting messages and dispatches by electric telegraph, for hire, over a line of telegraphic wires owned by them, at their office in Palmyra in this State; that they received and duly transmitted a dispatch or message, for and on behalf of the plaintiffs, to Cammaan & Co., of the city of New York, directing the purchase of "seven hundred (\$700) dollars in gold;" but, as the

case states, by error of some of defendants' operators working between Palmyra and New York—the precise cause of which is unknown—it was received in New York, and sent and delivered to that firm, containing an order to buy “seven thousand dollars in gold.” This dispatch or message was written by the plaintiffs' agent upon an ordinary blank of the defendants, containing certain provisions intended to limit their liability, particularly set forth in the statement of the case, and the principal question arises on the legal effect of those provisions.

It does not appear that the incorporation of the defendants is under a special act, and I shall assume, as the appellants' counsel states in his second point, that they are a corporation created under the general law (chap. 265 of the Laws of 1848) providing for the incorporation and regulation of telegraph companies, and the acts amendatory thereof. That act provides that any number of persons may associate for the purpose of constructing a line of wires of telegraph through this State, or from or to any point within this State, upon such terms and conditions and subject to the liabilities prescribed by the act; and it authorizes any association or corporation formed under it, to “make such prudential rules, regulations and by-laws as may be necessary in the transaction of their business, not inconsistent with the laws of this State or of the United States.” (§ 4.) And it is declared by section 11, as amended by chapter 559 of the Laws of 1855, that “it shall be the duty of the owner or the association, owning any telegraph line doing business within this State, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and, on payment of their usual charges for individuals for transmitting dispatches as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of \$100 for every neglect or refusal so to do, to be recovered with costs of suit in the name of the person or persons sending, or desiring to send, such dispatch;” and the twelfth section declares it to be the

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Opinion of the Commission, per LOTT, Ch. C.

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further duty of every such owner or association to transmit all dispatches in the order in which they are received, under the like penalty of \$100, to be recovered with costs of suit by the person or persons whose dispatch is postponed out of its order as therein prescribed. There are provisions in both of these sections having no application to this case, and therefore unnecessary to be set forth. No other specific duty is imposed by the act on the associations organized under it than those prescribed and declared by the said eleventh and twelfth sections. They relate to their receipt and transmission of dispatches "on payment of their usual charges for individuals," and their right and power to fix those at such rates as they may deem proper, with a prohibition to demand more from other telegraph lines and associations than from individuals. There is no limitation or restriction on their power to make such prudential rules, regulations and by-laws as they may deem necessary in the transaction of their business, except only that they shall not be inconsistent with the laws of this State or of the United States.

Under that general power, the defendants were authorized to prescribe such regulations as they deemed necessary to guard against errors or delays in the transmission or delivery of messages, and to declare that a party who failed to comply therewith should assume all risks and losses resulting from such errors or delays.

In the exercise of that power, they, in their ordinary blanks on which the dispatches sent by them are written, after stating that, "in order to guard against errors or delays in the transmission or delivery of messages, every message of importance ought to be repeated by being sent back from the station to which it is directed to the station from which it is sent, and compared with the original message," and that "half the tariff price will be charged for thus repeating and comparing," have inserted an agreement between the signer or signers of the message and the company, that the company shall not be responsible in case it is not so repeated for any such error or delay beyond the



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Opinion of the Commission, per LOTT, Ch. C.

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amount paid for transmission, unless specially insured and the amount of risk paid for and specified in the agreement at the time, which is followed by a direction or order immediately preceding the message to be sent, in the following terms: "send the following message subject to the above conditions and agreement." The conditions are reasonable, and not against public policy; on the contrary, they subserve to carry out the objects for which telegraphic associations are created, and especially to secure the receipt of a message in the words in which it is written and delivered for transmission. A party using such a blank and writing his dispatch thereon, assents to the terms and conditions on which it is to be sent. If he omits to read or to become informed of them, it is his own fault. A contract voluntarily signed and executed by a party, in the absence of misrepresentation or fraud, with full opportunity of information as to its contents, cannot be avoided on the ground of his negligence or omission to read it, or to avail himself of such information.

In this case there is no pretense of misrepresentation or fraud. It appears that the agent of the plaintiffs was the president of a bank at Palmyra, and that, as is stated in the case, "he had on hand at his office, which (to secure business) had been left there by the defendants, a lot of blanks like the one on which this message was written, and took the blank from among them to write this dispatch upon." After it was so written it was taken by him to the office of the defendants and presented to them for transmission to New York. Under this state of facts, the plaintiffs cannot be released from the legal obligation or effect of the contents of the instrument when perfected by the writing of the dispatch thereon, upon the admission in the case that "he or the plaintiffs had never read the printed part of it." The defendants had a right, from the agent's presentation of it, to assume and act on the assumption that he was fully informed of the provisions of the paper he had signed.

It is stated as a fact in the case, that the agent paid for the transmission of the message, but did not pay for or

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Opinion of the Commission, per EARL, C.

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request to have the same repeated; but what was paid does not appear, and there was no insurance.

It follows, from the views above expressed, that the plaintiffs are precluded by the express terms of their agreement from recovering the amount claimed by them. It therefore becomes unnecessary to express any opinion on the question affecting the general power, duties and liability of the defendants, discussed with great care and ability by the learned counsel of the parties, or as to the validity of any of the other conditions or provisions, contained in the blank, but not applicable to this case.

It may be proper, however, to notice the point of the appellants' counsel, that the defendants cannot limit their liability in case of negligence; and in regard to it, I deem it sufficient to say that it does not appear as a fact in the case, nor is it, on what is stated, a conclusion of law, that the defendants or their agent were chargeable with negligence.

The statement in reference to it is that the message was duly transmitted from the office at Palmyra, "but by error of some of the defendant's operators, working between Palmyra and New York, the precise cause of which is unknown, it was received in New York" different from its original direction. The parties, by this admission, acknowledge and declare that the cause of the error is unknown; the court therefore cannot, in the face of this acknowledgment and declaration, say that it was attributable to negligence.

It follows, from the views above expressed, that the judgment appealed from must be affirmed with costs.

EARL, C. It is not very important to determine whether telegraph companies are common carriers or not, because I find no decision, entitled to any weight as authority, which holds that the common-law liability of common carriers attaches to them. They may in one sense be called common carriers, as they are engaged in a public employment, and are bound to transmit, for all persons, messages delivered to them for that purpose. (Sherman & Redfield on Neg.,

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Opinion of the Commission, per EARL, C.

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606.) But if we call them common carriers in this sense, it does not follow that they become insurers, like the common carriers of goods. (Sherman & Redfield on Neg., 608; Redfield on Car., 408.)

The liability of telegraph companies is regulated by contract and the nature of their public employment. In the absence of any special contract limiting or regulating their liability, they do not insure the safe and accurate transmission of messages, but they are bound to transmit them with care and diligence adequate to the business which they undertake, and if they fail in such care and diligence, they become responsible. But while they are bound to transmit all messages delivered to them, they have the right to make reasonable rules and regulations for the conduct of their business. They can thus limit their liability for mistake, not occasioned by gross negligence or willful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him. (Redfield on Carriers, 405; *McAndrew v. Electric Telegraph Co.*, 33 Eng. L. & Eq., 180; *Birney v. New York & Washington Tel. Co.*, 18 Md., 341; *N. Y. & Washington Printing Tel. Co. v. Dryburg*, 35 Penn., 298; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Western Union Tel. Co. v. Carey*, 15 Mich., 525; *Wannan v. Western Union Tel. Co.*, 37 Mo., 472; *Camp v. West. Union Tel. Co.*, 1 Metcalfe [Ky.] 164.)

Here Cuyler wrote the message upon a blank, which had been furnished by the company, specifying that the company would not be held responsible for any error in the transmission of the message, unless it was repeated. He had had the blanks in his possession for some time, and had had abundant opportunity to read them. The blanks contained the terms upon which the company solicited and would accept his business, and when the message was written upon one of them and brought to the office of the company, its agent had the right to assume and believe that he accepted the terms, and assented to and understood the agreement. In the absence

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Opinion of the Commission, per EARL, C.

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of any proof that the blanks were printed in such small type, or otherwise, as to mislead, or that Cuyler was so illiterate that he could not read, he must be presumed to have understood the contents of the blank, and upon the ordinary principle applicable to the doctrine of *estoppel in pais*, he must be held estopped from denying or disputing the agreement. (*Lewis v. Great Western Railway Co.*, 5 Hurlstone & N., 867; *Grace v. Adams*, 100 Mass., 505; *Wolf v. Western Union Tel. Co.*, 62 Pa., 87.) This would not be so if the blank had been delivered to Cuyler at the time he wrote the message upon it, and he had no opportunity to read it, and to the knowledge of the telegraph operator had not read it. In such case there would have been no room for the application of the doctrine of estoppel, and no reason for indulging in presumptions.

We should reach the same conclusion if we held that defendant was a common carrier, with all the liabilities which attach to such carriers at common law; for it is well settled in this State that common carriers can contract for exemption from their common-law responsibility, as to everything, certainly, except their gross negligence or willful misconduct. (*Bissell v. N. Y. Cent. R. R.*, 25 N. Y., 442; *French v. Buffalo, N. Y. and Erie R. R. Co.*, 4 Keyes, 111.)

I am, therefore, of the opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN McKENZIE, Respondent, v. HIRAM SMITH, Sheriff, etc.,  
Appellant.

In an action for the recovery of possession of personal property, the defendant was arrested under the provisions of subdivision 8 of section 179 of the Code, and, upon giving the undertaking required by section 187, in such cases, was released from arrest by the sheriff, who thereupon returned the order of arrest to plaintiff's attorney. Plaintiff excepted to the bail; they failed to justify, but prior to the expiration of the time for justification, surrendered the defendant to the sheriff, in whose custody he remained. Plaintiff subsequently recovered judgment for the delivery of the property, or payment of its value, with costs.—*Held*, that the surrender by the bail was unauthorized, and did not exonerate them, and that, under section 201 of the Code, the sheriff was liable as bail; which liability was not satisfied by having the defendant within his custody, amenable to process, but that, as far as the plaintiff was concerned, he stood in the place of the bail in the undertaking given to him, and the extent of his liability was measured by theirs.

(Argued May 19, 1871; decided September term, 1871.)

APPEAL from order of the General Term of the Supreme Court in the seventh judicial district, reversing a judgment in favor of defendant entered upon the decision of the court at circuit, and ordering a new trial.

The action was brought against defendant as sheriff of the county of Monroe, for an alleged liability growing out of the facts set forth fully in the prevailing opinion of LOTT, Ch. C.

*W. F. Cogswell* for appellant.

*James C. Cochrane* for respondent.

LOTT, Ch. C. This action was brought by the plaintiff against the defendant, as sheriff of Monroe county, under the following circumstances: The said plaintiff commenced an action in the Supreme Court on the 15th day of October, 1859, against one Marvin C. Bills for the recovery of a gold watch wrongfully detained from him, and by an indorsement in writing upon the proper affidavit delivered for that purpose, accompanied by the requisite undertaking, he required

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Opinion of the Commission, per LOTT, Ch. C.

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the said sheriff to take the same from the said Bills and deliver it to him the said plaintiff. The said sheriff thereupon demanded the said property of Bills, but it was not delivered to him, nor could he find it so as to take it and make such delivery, and he made a return of ~~his~~ doings in that behalf. The plaintiff subsequently, and on the 29th day of the same month, presented to a judge of the said court an affidavit of the above-mentioned facts, and of other facts showing that the said Bills had concealed, removed and disposed of said watch, so that it could not be found or taken by the said sheriff, and with the intent to deprive the plaintiff of the benefit thereof (being the cause or ground of arrest mentioned in the third subdivision of section 179 of the Code, as then amended and in force); and thereupon, and upon the giving of the undertaking required by law, said judge made an order directing the said sheriff to arrest the said Bills, and "to hold him to bail in the amount of \$250, the undertaking to be such as is required by statute in such action," and also to make a return of the said order to the plaintiff's attorney by the tenth day of November, 1859, at his office. The defendant arrested the said Bills under and pursuant to the said order, and afterward discharged him from such arrest on giving a written undertaking executed by two sureties, by which they bound themselves for the delivery of the said property to the plaintiff, if such delivery should be adjudged, and for the payment to him of such sum as might for any cause be recovered against the defendant in the said action.

The sheriff after such discharge delivered the said order of arrest to the plaintiff's attorney, with a return indorsed thereon to the effect that he had arrested the defendant, as he was therein commanded, and had taken bail as he was directed, together with a copy of the said undertaking. The said bail were excepted to and failed to justify, but surrendered, and no other bail were ever substituted for them.

A judgment was subsequently rendered in the action against Bills for the delivery of the watch to the plaintiff, or in default thereof for the payment of its value, assessed at

eighty-five dollars, and also directing the payment by him of seventy-one dollars and forty-seven cents, the costs of the suit, and an execution was thereupon issued to the said sheriff directing such delivery, or the collection of its assessed value, if such delivery could not be had, and for the satisfaction of said costs out of the property of the said Bills, and the said sheriff afterward returned it wholly unsatisfied, and with the further return thereon that he could not find the said watch.

No other execution, except that above mentioned, was ever issued upon the said judgment. The preceding facts are set forth in the plaintiff's complaint, and he thereupon claimed to recover the said assessed value of the watch, and the said costs from the defendant.

The answer of the defendant did not deny any of the said allegations, but set up as a defence that after the rejection by the plaintiff of the bail given by the said Bills upon his said arrest, and before the expiration of the time limited for their justification, they refused to justify, but they surrendered the said Bills to him, the said sheriff, and that he thereupon again took him the said Bills into his custody and held him by virtue of the said order of arrest, and that he continued to hold him in such custody.

The justice who tried the issues found the facts alleged in the complaint to be as therein stated, and also found, in reference to the matter of defence set up in the answer, that the said bail, on the 19th day of November, 1859, and before the time expired for them to justify, "surrendered said Bills to the custody of the sheriff, and the said Bills was thereupon immediately taken into custody by the sheriff, and is and has ever since and now is held by him on the jail limits; that on such surrender he was placed in the jail of said county of Monroe, and afterward and on the same day liberated on the jail limits, upon executing the usual limit bond, but no papers were had at said surrender, except the original undertaking upon which the certificate of surrender was made by said sheriff acknowledging the surrender of said Bills to his cus-

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Opinion of the Commission, per LOTT, Ch. C.

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tody and no order was made by any judge that the said bail be exonerated."

He thereupon found, as a conclusion of law, that the defendant was entitled to judgment with costs. Judgment was entered upon said decision, which, on appeal to the General Term of the seventh district, was reversed and a new trial was ordered, from which order an appeal was taken to this court by the plaintiff, and he in his notice of appeal stipulated that if the said order was affirmed, judgment absolute should be entered against him.

The judge on the trial stated, in giving his reasons for the decision made by him, that he was of opinion that the defendant as sheriff was liable only for the safe keeping of the defendant's body, and that the matters set up by him in his answer constituted a defense to the action.

The majority of the court at General Term, on the contrary, held that the defendant was liable for the delivery of the property to the plaintiff, or for the payment of its assessed value, in case of its non-delivery, and was also bound to pay the costs of the action against Bills.

The question as to the nature and extent of the defendant's liability, upon the facts in this case, is to be determined by the construction of the provision of the Code of Procedure applicable to the subject, in force when the said arrest was made and the subsequent proceedings were had. It will, therefore, be necessary to refer to them with particularity.

It is provided, by section 185, that the sheriff, to whom an order of arrest in an action is delivered, shall execute it by arresting the defendant and keeping him in custody until discharged by law; and the next section (§ 186) declares that the defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in some of the subsequent sections.

Section 187 provides that the defendant may give *bail*, by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupa-



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Opinion of the Commission, per LOTT, Ch. C.

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tion, to the effect that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or, if he be arrested for the cause mentioned in the third subdivision of section 179, an undertaking to the same effect as that provided by section 211, by which the sureties therein "are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause, be recovered against the defendant."

This section contemplates two classes of *bail*: one in the cases specified in subdivisions 1, 2, 4 and 5 of section 179, and the other for the cause mentioned in the third subdivision thereof.

They are required to give different undertakings; that of the first class is to be to the effect declared in the first clause of said section 187, and that of the latter is to be "to the same effect as that provided by section 211," and which is stated in the preceding extract therefrom.

The defendant Bills was arrested for the cause mentioned in the said third subdivision of section 179, and he obtained his discharge from such arrest by the delivery to the sheriff of an undertaking by two bail, deemed by him to be sufficient, to the effect provided in said section 211.

It is further provided, by section 201, that "if, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail; but he may discharge himself from such liability by the giving and justification of bail, as provided in sections 193, 194, 195 and 196, at any time before process against the person of the defendant to enforce an order or judgment in the action." Those sections relate to the justification of the bail in the undertaking given on the arrest, if they are not accepted by the plaintiff, or of other bail substituted for them, in and by a new undertaking in the form prescribed in said section 187, their quali-

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Opinion of the Commission, per LOTT, Ch. C.

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fication and the proceedings to procure their allowance. It is not claimed that the defendant had discharged himself from such liability by a compliance with those sections. It is therefore unnecessary to refer to their provisions. Nor were the facts found by the judge on the trial in reference to the surrender, alleged to have been made by the bail to the sheriff, and the proceedings thereon, sufficient to discharge him from liability.

It is provided by section 188 of the Code, that "at any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county in which he was arrested," in the manner therein particularly specified, but it is expressly declared, in the last clause thereof, that this section shall not apply to an arrest for the cause mentioned in the third subdivision of section one hundred and seventy-nine" (being the cause for which the arrest in question was made), so as to discharge the bail from an undertaking given to the effect, provided by section 211. This declaration shows that the bail in an undertaking given in that case cannot be exonerated by the surrender of a defendant to the sheriff. His power and authority, under the order authorizing the arrest, end on the discharge of the defendant, upon the receipt and acceptance of such undertaking. I am not aware of any other provision, nor have we been referred to any, under which the proceedings had for the surrender of Bills were authorized. When that was made, the order for his arrest had been returned to the plaintiff's attorney by the sheriff, and he had lost all control over it. The plaintiff is therefore not affected by those proceedings, and they are to be disregarded.

It follows that, under section 201, above referred to, the defendant, on the failure of the bail taken by him to justify, became himself liable as bail. The extent of his liability in that relation is to be determined by that of the bail in the undertaking given to him. He, so far as the plaintiff is affected, stands in their place, and has become liable to the

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Dissenting opinion, per HUNT, C.

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same extent to the plaintiff as they would have been if they had been accepted by him. That liability, under section 187, on the facts constituting the cause of arrest, was that provided for by section 211, being for the delivery to the plaintiff of the watch in question, if such delivery was adjudged, and for the payment to him of such sum as might, for any cause, be recovered against the defendant. This construction is consistent with the nature of the action for the recovery of personal property, when the immediate delivery thereof is claimed. The primary object, in such case, is the recovery of its possession in specie, and the security required to be given by the defendant, in order to retain it, is that provided for by said section 211, and after it has been given it cannot be discharged, except upon such delivery or the payment of its value.

It is also confirmatory of such construction that the last clause of section 187 (originally section 162) and of subdivision 2 of section 188 (originally section 163) did not form a part of the Code, as first enacted, but were both added by the amendatory act of 1849. The first of those amendments clearly indicates an intention on the part of the legislature that the undertaking by the bail on an arrest, for the cause referred to therein, was to be different from that for the other causes specified in section 179, and it declares what obligation should in that case be assumed, and the other shows that, when such an obligation is entered into, the bail cannot discharge themselves therefrom by a surrender of the defendant.

The above considerations lead me to the conclusion that the order of the General Term should be affirmed, and that judgment absolute must, under the stipulation given by the defendant, be rendered against him.

- HUNT, C. (dissenting). The plaintiff bases his right of recovery upon section 201 of the Code of Procedure. It is there provided that "if, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself

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Dissenting opinion, per HUNT, C.

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be liable as bail," (§ 201.) In the present case, the defendant was arrested and gave bail, but the bail did not justify. The sheriff, by the language quoted, thereupon becomes liable as bail. The sheriff claims that he has satisfied this liability, by having the defendant within his custody and amenable to a process to be issued against his person. The plaintiff insists that his liability, as bail, requires a performance of the obligation entered into by the sureties who executed an undertaking to discharge the defendant from arrest, to wit, for the delivery of the property sought to be recovered, and for the payment of any sum adjudged against the defendant. The judge at the circuit concurred in the view taken by the sheriff. The General Term adopted the view taken by the plaintiff.

The order of arrest in the original action was for the cause mentioned in the third subdivision of section 179, to wit: the recovery of personal property unjustly detained, and concealed, with intent that it should not be found by the sheriff, and which could not be found. In that case it is provided (§ 187) that the defendant, to procure his discharge, must give an undertaking to the same effect as that provided by section 211, to wit: for the delivery of the property and the payment of such sum of money as may be adjudged against the defendant. In all other cases the defendant may be discharged upon executing an undertaking; he shall, at all times, during the pendency of the action, be amenable to the process of the court, and to such as may be issued to enforce its judgment. In the latter proceeding, the bail may surrender their principal to the sheriff, and be exonerated from their liability. (§§ 189, 190.) In like manner, the sheriff, in such case, may give new bail in place of those excepted to (§ 193), and can receive the actual custody of the defendant in discharge of the bail given by him. This proceeding is reasonably simple, and is in accordance with all general rules.

In the special case of an arrest for removing and concealing property sought to be recovered, the proceeding is not so plainly defined. The defendant gives an undertaking, not

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Dissenting opinion, per HUNT, C.

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to be amenable to the process of the court, but to make delivery of the property. When, as in this instance, the sureties to such an undertaking fail to justify, what are the sheriff's powers in protecting himself, or in securing the plaintiff?

Section 211, which regulates the undertaking to be given in such case, is a part of the Code regulating the action for the claim and delivery of personal property. The sheriff is directed to take it from the possession of the defendant, upon receiving from the plaintiff a sufficient undertaking to the defendant, conditioned, among other things, for the return to him of the property, if it shall be so adjudged. The defendant may, however, require the return of the property to himself, from the sheriff upon executing to the plaintiff a similar undertaking. (§§ 209 to 211.) In each of these cases, in the event of an exception to the sufficiency of the sureties, it is provided that, the sheriff shall retain the property in his hands until they justify, and if they fail to justify, he shall deliver the property to the opposite party. If he fails to do his duty in this respect, he becomes liable to the party aggrieved, for the damages sustained by him. He has the property in his hands, is provided with ample means to protect himself, by requiring an undertaking and a justification of the sureties, or by redelivering the property. If he fails to do this duty, there is eminent justice in compelling him to redeliver the property or to pay its value.

In a case like the present it is quite different. The sheriff has been guilty of no neglect; he has incurred no default; he could have done nothing more than he has done. It was his first duty to arrest the defendant; he performed it; it then became his duty to hold the defendant until he gave bail; he performed that duty also. The bail refused or neglected to justify; he could not compel them to justify; he could not compel the defendant to give other sureties; he could only hold his person, and that he continued to do. Will it be said that he could himself have given a new undertaking, with sufficient sureties? That would have been a voluntary assumption of the obligation now sought to be imposed upon

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Dissenting opinion, per HUNT, C.

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him, to wit, the payment of the debt. The undertaking, by section 211, must have been to that effect, and not for the defendant's subjection to the process of the court. This was an obligation that he was not bound to assume. I do not see that there was the slightest neglect or omission of the sheriff, or that, in any particular, he failed in the strict performance of his duty. To hold him liable in such a case would be intolerable. Such could never have been the intention of the legislature. The explanation is this: When it is said that he shall be liable as bail, it means the bail who undertake that the defendant shall be in person amenable to the process of the court. The word bail has a technical meaning in the law. When, under the old forms, the party arrested gave bail to the sheriff, he undertook thereby to put in "bail" to the action, and to perfect "bail," using that precise word in his undertaking. Its meaning then was, and always has been, that the "bail" undertook that the defendant should be personally amenable to the process and judgment of the court. (Dunlap's Practice; Paine & Duer's Practice.) The sections of the Code, from 186 to 204, prescribe the undertaking and qualifications of "bail." The word "bail" is used throughout all this range of sections, and the subject is the seizure of the person, the discharge of the person, and the amenability of the person to the process of the court. Among them is the section (201) declaring the sheriff to be liable as bail, in certain contingencies. It is a declaration that he shall be bail of the character there spoken of, to wit, for the defendant's appearance, and not for the payment of the debt. The sections 206 to 211 are upon the subject of the delivery and redelivery of personal property, and the undertakings to be given with sureties to procure such delivery. The persons entering into those obligations for the delivery of the property and the payment of the amount adjudged, are sureties; they are not bail; that designation is nowhere applied to them. The word bail is not used in the chapter, except when it is declared that the qualifications of sureties, and their justification, shall be the same as are prescribed, in respect to bail,

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Dissenting opinion, per HUNT, C.

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upon an order of arrest. (§ 213.) They are sureties, not bail; but they shall possess the same qualifications as are possessed by bail. Bail are technically described as such under the head of arrest of the person, and the intention of the legislature was to impose that liability and no other upon the sheriff, when he had arrested the defendant under the provisions of that chapter.

By the same section, which declares the sheriff to be liable as bail, it is enacted that he may discharge himself from such liability by giving and the justification of bail, as provided in sections 193 to 196. These sections prescribe the details of the manner of giving bail under the head of arrest of the person, and immediately following the section (187) making the obligation of bail to be that of the subjection of the person to the process of the court. This mode of discharge is in harmony with the explanation I have already given.

Look again at the class of cases in which it is declared that the sheriff shall himself be liable as bail. (§ 201.) "If after being arrested, the defendant escape or be rescued," the sheriff shall be liable as bail; because, having the party in his power, he is bound to keep him. He is bound to hold him against a rescue or an escape. The law furnishes him with ample means of protection, and if he neglects to use them, it justly makes him liable, as the bail would have been. "Or bail be not given or justified;" the same reason governs here. Suppose, however, the defendant is arrested, but does not escape, does not give bail at all and makes no deposit: is the Sheriff liable, and to what extent? If the plaintiff's argument is sound, he is liable, not for his appearance, but for the return of the property claimed. Section 187 says, that when arrested for this cause the defendant can be discharged only upon giving an undertaking for the delivery of the property and the payment of such sum as may be received. The defendant, upon being arrested, may say, "I am not able to procure that undertaking with sureties; I decline to attempt it; do with me as the law directs." The sheriff's duty, and the only possible mode he can adopt, is to hold the

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Statement of case.

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defendant in custody. This he does. The plaintiff, however, says, "This may all be so, but section 201 holds the sheriff liable as bail in such case, and that bail, according to section 211, is liable for the value of the property." This is entirely unsound. He is liable as bail technically, *i.e.*, for the custody and appearance of the defendant, and for nothing more.

The defendant was actually surrendered to the sheriff and was in his custody legally. That was all that was important for him to do or to know. Whether the parties originally liable actually caused an exoneration to be entered, was of no interest to him.

In my opinion, the order for a new trial should be reversed, and the judgment at the Special Term should be affirmed with costs in the Supreme Court and in the Court of Appeals.

For affirmance, LOTT, Ch. C., LEONARD and GRAY, CC.

For reversal, HUNT and EARL, CC.

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CHARLES L. GAGER, Respondent, v. DWIGHT L. BABCOCK,  
Appellant.

Defendant was the nominal owner of a steam-tug. A., the real owner, managed her as master, exercised entire control over her, and received all her earnings. She was libeled in the District Court of the United States, and seized at Buffalo, for a penalty incurred by carrying passengers without a license. A. procured plaintiff to become bail for her discharge. A decree was rendered for the penalty, and plaintiff became bail upon an appeal bond, conditioned that defendant should pay "all such costs and expenses" as should be awarded against him. The decree was affirmed, and plaintiff paid the amount of the execution thereon. All this was without communication or consultation with defendant, who resided in the city of New York. Plaintiff brought this action to recover back the money paid, basing it upon the appeal bond.

*Held*, 1st, that plaintiff made the payment, not as surety upon the appeal bond, but as defendant in the decree, which was *in personam* against him as surety upon the first bond; also, that as the appeal-bond was not conditioned to pay damages there could be no recovery for the amount of the decree.



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Statement of case.

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2d, that as the vessel was in a home port, and defendant near enough to be consulted, there being no pressing emergency, the master could not bind him.

(Argued May 19, 1871; decided September term, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the eighth judicial district, affirming judgment in favor of plaintiff entered upon the decision of the court. The action was brought to recover the sum of \$675, which plaintiff alleged he had been compelled to pay as surety upon an appeal bond executed for the benefit of defendant.

The facts are as follows: John Adams built a steam-tug, called the L. L. Britton, and owned and managed her as master. Becoming embarrassed financially, he induced the defendant to take the title to her, and had her enrolled and licensed in his name. Defendant did not pay or agree to pay anything for her. Adams continued to run and manage her as master, and received all her earnings. The defendant never gave any directions in regard to her, never exercised any control over her, and never had any of her earnings, or any benefit from her, and did not know how, or for what, she was used. In June, 1857, said Adams used the tug for the transportation of passengers to a prize fight, without inspection and license, as required by the act of congress of July 7, 1838, entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," and thereby said vessel incurred a penalty of \$500. She was thereafter libeled, for the recovery of said penalty, in the District Court of the United States for the northern district of New York, and was seized by the marshal. To procure her release from the custody of the marshal, Adams procured the plaintiff, and one Kennedy, to sign a bond to the United States, as sureties, conditioned to abide the decree of the court in the admiralty suit. Adams appeared in that suit in the name of the defendant, and answered, and contested the same in his name; the court decided that the

## Statement of case.

United States was entitled to recover the penalty, and judgment was given against the said sureties therefor, with costs and expenses. Adams, in the name of the plaintiff, appealed to the Circuit Court of the United States, and, upon said appeal, signed a bond, together with the plaintiff, and one Hebard, whom he procured to sign with him, conditioned that the defendant should prosecute the said appeal with effect, and pay "all such costs and expenses" as should be awarded against him as such appellant. Said appeal was thereafter brought to a hearing, and the decree of the District Court was affirmed. Execution was issued upon the decree of the Circuit Court, and the plaintiff paid the amount thereof.

The defendant had no notice or knowledge of any of the proceedings, and neither directed nor sanctioned them. The plaintiff then brought this action upon the bond, given upon the appeal, to recover the money which he thus paid. The court decided that he was entitled to recover, and gave judgment in his favor. Other facts, so far as necessary, appear in the opinion.

*A. P. Laning* for the appellant. The master of a vessel is not the general agent of the owner. (*Mitchison v. Oliver*, 5 Ellis & B., 419; 32 Eng. L. and Eq., 219, 232; *The Tribune*, 8 Sumner, 144; *The Flash*, Abb. Adm., 67; *Zany v. Jordan*, 37 Maine, 276; Story on Agency, §§ 118, 119.) The master cannot bind the owner in a home port. (*Bryant v. Ins. Co.*, 18 Pick., 543; *Pike v. Balch*, 38 Maine, 302; Marvin on Merch. and Salvage, § 3.) Defendant is not precluded from disputing his authority. (*Gardner v. Tyler*, 16 Abb., 17; *Many v. Wheeler*, 18 Abb., 1.)

*George B. Hibbard* for the respondent. As owner plaintiff was liable for Adams' contracts. (1 Parsons on Mari. L., 111; *Flanders v. Merritt*, 3 Barb., 201; *King v. Loury*, 20 Barb., 532; *Provost v. Patchin*, 5 Selden, 235; *Kenzel v. Kirk* [in the Court of Appeals], 32 Howard, 269; 1 Parsons on S. and Ad., 109, 112; *Barker v. Higley*, 15 J. Scott [N.

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Opinion of the Commission, per EARL, C.

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S.], 27, 109 Eng. C. L. R., 26; Curtis on Rights and Duties of Seamen, 194. Under the condition of appeal bond that defendant "should make his appeal good," plaintiff was liable for full amount paid. (1 Stat. at L., 83 [Brightley's Dig. Laws, U. S., 256]; 2 Stat. at L., 244 [Brightley's Dig., 261]; 2 Conkling's Ad., 385.)

EARL, C. The defendant was the mere nominal owner of the vessel; and as between him and Adams the latter appears to have been the beneficial owner controlling the vessel and receiving her entire earnings. At the time of the seizure of this vessel the plaintiff also owned a vessel which was seized for a similar offence, and he proposed to Adams that if he would procure a surety for him, he, plaintiff, would sign for him, Adams. Adams then did procure a surety for him and he signed for Adams. Such is the evidence, and the court might well have inferred that the plaintiff signed the bond for Adams' benefit upon his credit, and not upon the credit of the defendant as the legal owner of the vessel.

The plaintiff in his complaint does not base his right to recover upon the first bond, which he executed to release the vessel from the marshal, and he does not, in his complaint, even allude to or mention that bond, and he does not mention the fact that he ever incurred any liability on account of that bond, or that any judgment or decree had been rendered against him as surety in such bond. He bases his right to recover entirely upon the bond given upon the appeal, and the payment of money by him as surety in such bond. It does not appear, however, that he ever paid a dollar as surety, on the appeal bond. As I understand it, the proceeding in the District Court was one *in rem* against the vessel, and after the bond was given to release the vessel, the bond took the place of the vessel, and the decree in that court was not one which could be enforced *in personam*, against the defendant as owner, because he did not sign the bond, but it was a decree *in personam* against the sureties, which could be enforced against them by execution. This

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Opinion of the Commission, per EARL, C.

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decree was upon the appeal affirmed in the Circuit Court, and a decree of affirmance was entered in that court. Execution was issued upon this last decree against the plaintiff, and he paid it, and for such payment he brought this action. He made the payment as defendant in the decree and execution, and not as surety upon the appeal bond. He would have been equally obliged to pay the execution if the bond had been signed by some one else, and he had not signed it. Hence, I am unable to see how this action, based upon a claim for money paid by plaintiff as surety upon the appeal bond, can be maintained. But further, the appeal bond was not conditioned to pay the damages, as well as costs and expenses, but simply to pay "the costs and expenses" awarded against him upon the appeal. Here there was no proof of the amount of the costs and expenses upon the appeal, and if the plaintiff had been prosecuted upon the appeal bond, I do not see how he could have been made liable for the amount of the decree appealed from, as well as the costs and expenses.

Hence, without going further, we find abundant reason for reversing the judgment appealed from. But if we so far assent to plaintiff's claim as to hold that he, as surety in the appeal bond, was liable to pay the whole amount of the decree in the Circuit Court, and that he did pay it as such surety, the result must be the same.

We will assume, as we must, that the defendant was the legal owner of the vessel, and that he permitted himself to be held out to the world as such by Adams, the master. He resided in the city of New York, and Buffalo, in the same State, was the home port of the vessel, in which she was seized. At the time the appeal bond was given, the vessel was in no peril. She had been released and restored to the master. Under such circumstances, Adams had no authority, as master, to prosecute an appeal, or to give the appeal bond. It is not necessary to determine what authority he would have had in a foreign port, because masters have greater authority in a foreign than they do in a home port. He was in the home port, near the residence

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Opinion of the Commission, per EARL, C.

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of the owner, and could have communicated with him. A master, in a case of extreme necessity, has authority to sell the cargo. But in *Bryant v. Commonwealth Ins. Co.* (13 Pick., 543), where a vessel was stranded on the coast of Virginia, and the cargo was landed without damage, and was not of a perishable nature, and might have been kept in reasonable safety until the owners and insurers, who lived in Massachusetts, could be heard from, it was held that the master had no authority to sell the cargo, and break up the voyage, without waiting until the owners and insurers could be consulted. Mr. Justice PUTNAM, in delivering the opinion of the court, says: "It would be clear that if the master assumed to act for the owners and underwriters, when they were present, or so near as to be consulted in regard to the disposition of the property, his acts, under such assumption of authority, would not bind them." The master is the agent of the owner, appointed by him, and is authorized to act for him in all matters which are fairly embraced within the scope of his appointment. He has the control and management of the vessel, and can hire and discharge seamen, can, ordinarily, purchase supplies and procure repairs upon the credit of the owner, and, in case of any emergency, in the absence of the owner, do whatever is necessary to save the vessel or to prosecute his voyage. But when the owner is himself present, or within easy access, that agency of the master, which is founded on necessity, disappears, for the necessity has ceased to exist. (1 Parsons on Mar. Law, 380.) The contracts which he is authorized to make must relate to the condition or the use and employment of the ship. Here the owner was within easy access, and the appeal and giving of the bond had no relation whatever to the condition or use or employment of the vessel. All peril to the vessel had passed. In *Belden v. Campbell* (6 Eng. L. & E., 473), it was held that the master had no authority to borrow money to pay for work already done; and, therefore, where the ship, bound for Newcastle, was towed into that port, no agreement having been previously made that the towage was to be

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Opinion of the Commission, per EARL, C.

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paid for immediately, and the master, six days afterward, borrowed money to pay for the towage, it was held that the owner was not liable. Here the bond was given long after the liability, if any, of the owner had been incurred. To test it, could the master have borrowed money of the plaintiff, upon the credit of the owner, to pay the decree? I think not. And if he could not do this, how could he bind the owner by procuring the plaintiff, in any way, to become surety for the payment of the decree? Hence I conclude that within principles of law, that admit of no dispute, the master had no authority to bind the owner to the plaintiff, by the contract of indemnity, implied by his becoming surety upon the appeal.

But it seems to be claimed, on behalf of the plaintiff, that, admitting all this, inasmuch as the defendant was bound by the decrees of the District and Circuit Courts, and could not impeach them, he is, irrespective of the authority of the master, bound to the plaintiff, who became his surety upon the appeal. The master appeared for the defendant in those courts, and procured an attorney to appear for him; and it may be that he is so far bound by the decrees pronounced against him, that he cannot attack or impeach them collaterally. (*Brown v. Nichols*, 42 N. Y., 26.) An unauthorized attorney may appear in an action for a party, and the party may be bound by the judgment pronounced against him; but yet he may not be bound by all the attorney may assume to do for him. If the unauthorized attorney should procure some one to pay or become security for the judgment, he could not bind the party. And suppose he should commence a suit and procure an attachment or order of arrest to be issued, and procure some one to sign as surety an undertaking, would it be claimed that he could thus place the party for whom he acted without authority under any obligations to the surety? And yet the party might be bound by the judgment. A person who becomes surety for a party in a legal proceeding must see to it that

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Opinion of the Commission, per LEONARD, C.

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he becomes such upon the request of the party himself, or his attorney or agent duly authorized to act for him.

The plaintiff's case is not strengthened any by the fact that the plaintiff signed the first bond, and became liable thereon, because he has not in any way based his right of action upon that bond, and I will not, therefore, inquire whether the defendant was bound to indemnify him as surety upon that bond. But it may well be doubted whether he was, as the vessel was in her home port, and the owner within easy access where he could have been consulted.

The judgment of the Circuit and General Term must be reversed and new trial granted, costs to abide event.

LEONARD, C. The evidence was to the effect that the master defended the libel against the propeller L. L. Britton, prosecuted by the United States for a penalty incurred by running her and carrying passengers without an inspection and certificate, as required by law for that purpose, and procured the plaintiff to become bail in such libel proceeding for the discharge of the propeller; and again, after decree of the District Court of the United States for the penalty, prosecuted an appeal to the Circuit Court, and procured the plaintiff to become bail on such appeal, without any communication or consultation with the defendant as owner. These proceedings were had in the District Court for the northern district of New York, and the propeller was arrested and the bail given, and the defence interposed at Buffalo, while the defendant resided in the city of New York. The justice of the Supreme Court, before whom this action was tried, has found as a fact that the master, as the agent of the defendant, prosecuted such appeal, and as such agent applied to the plaintiff to become bail on the appeal, and that the plaintiff with the master and another executed the appeal bond.

The said justice has also found, as a conclusion of law, that the master had authority, as agent of the defendant, to procure the plaintiff to execute said bond for the defendant; that

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Opinion of the Commission, per LEONARD, C.

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the defendant, having the legal title to the said propeller, and allowing himself so to be held out to the world, is liable on the obligations entered into for the boat at the request of the master.

It is entirely clear from the evidence, as well as from the facts and conclusions of law found by the said justice, that the only authority of the master to defend the libel, procure the plaintiff to become bail for the discharge of the propeller, take the appeal, and procure the plaintiff also to become bail on the appeal as agent of the defendant, was derived from his relation to the propeller as master, the defendant being her owner.

The rule as to the authority of the master at a home port to pledge the owner's credit is as follows: "If the owner or his personal agent be at the port, or so near to it as to be reasonably expected to interfere personally, the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all; but must leave it to him or his agent to do what is necessary." (Abb. on Ship., pp. 140, 141 [marginal], and cases there cited.) The rule is different if the vessel be at a foreign port or at a distance from the owner's residence, and the necessity is pressing. Then the occasion authorizes the master to act at once and pledge the owner's credit.

In the case before the court there was no pressing emergency. The vessel was at Buffalo and the owner at New York. Communication with the owner required but two or three days. He could have been readily consulted and his wishes ascertained. Under the general authority of the master, he had not the least authority to bind the owner to the plaintiff for becoming security for bonding the propeller on the arrest, or afterwards for the appeal bond. In fact, there appears to have been not the shadow of a defence to the libel, so far as the testimony of the apostles shows, and it should not have been defended. It appears to have been done on the credit of the master, in fact, inasmuch as he undertook to be bail for the plaintiff for the discharge of his vessel, arrested for



## Statement of case.

a violation of the same law, and incurring the penalty therefor on the same occasion, if the plaintiff would unite with him in giving security to obtain the discharge of the L. L. Britton. There should be a new trial, with costs to abide the event.

All concur.

Judgment reversed.

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MORRIS F. JAMES, Respondent, v. SHUBAEL R. GURLEY,  
late Sheriff, etc., Appellant.

48	163
163	351

Where a deputy sheriff, after he had returned an execution *nulla bona*, with the consent of the plaintiff's attorney and the county clerk, procured the same from the clerk's office, erased the return, and by virtue thereof levied upon and sold property,—*Held*, that the execution was irregular, but not void, and that the deputy having treated it as valid process, neither he nor his principal could refuse to answer for the money collected thereon. (GRAY, C., dissenting.)

(Argued May 7, 1871; decided September term, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth district, affirming a judgment in favor of the plaintiff, entered upon the decision of the court on a trial without a jury.

The action was brought against the defendant, as sheriff of the county of St. Lawrence, to recover damages for not returning certain executions, and not paying over moneys collected thereon.

The judge before whom the cause was tried found the following facts: From January 1, 1859, to December 31, 1861, the defendant was sheriff of the county of St. Lawrence, and Joel Houghton was one of his deputies. On the 24th of October, 1860, the plaintiff, Morris F. James, recovered a judgment in the Supreme Court against Thomas B. James for \$6,224.49, which was duly docketed and execution issued thereon on the 27th day of October, 1860, and delivered to said Houghton as deputy sheriff, and on the same day the

## Statement of case.

deputy made a levy on a store of goods belonging to the defendant therein, and upon such execution the deputy received eighty dollars in cash; and on the 29th day of October, 1860, the said Thomas B. James made a general assignment to D. Magone, Jr., for the benefit of creditors, and by virtue thereof Magone entered into the possession of said store of goods, subject to said levy.

On the 7th day of December, 1860, Magone, as assignee, sold the store of goods to Morris F. James, the plaintiff, and, among other considerations, in payment of said judgment; and afterward the said Morris F. James told the deputy sheriff to let the goods in the store stand, and do nothing further with them until instructed; and no further instructions were given, and no further act done under said execution by said deputy.

On the 22d of November, 1860, a judgment was recovered by Robinson & Parsons against Thomas B. James for \$1,159.79, and on the 23d of November, 1860, execution was duly issued thereon, and delivered to said Houghton as deputy sheriff. On the 13th December, 1860, said deputy returned said execution *nulla bona*, and filed the same in the office of the clerk of St. Lawrence county, and afterward, with the assent of the plaintiff's attorney, procured the execution from the clerk's office, erased his return and the filing therefrom, and then, by virtue of said execution, took possession of and removed a quantity of goods then in said store formerly occupied by Thomas B. James, and owned by him, but then in possession of the plaintiff Morris F. James, and on the 29th of April, 1861, sold the same at sheriff's sale for a sum sufficient to pay said execution, with interest and expenses of sale, and that but \$273.50 of the proceeds of the sale was received by the attorney in said execution, and the remainder by the said deputy, and that has not been paid over, and, although demanded, has been refused.

On the 4th day of June, 1863, another return *nulla bona* was made by said deputy on said execution, and filed. The amount due on said execution, August 13, 1864, was \$1,132.92.

## Statement of case.

On the 22d January, 1864, Robinson & Parsons sold and assigned to the plaintiff, Morris F. James, the judgment in their favor against Thomas B. James.

From these facts the judge concluded that the action was properly brought against the defendant, as late sheriff; and that the plaintiff was entitled to recover \$1,132.92 and costs.

*John H. Reynolds* for appellant. An officer, without process, is no officer in the case in which he assumes to act. (*Commonwealth v. Kenard*, 8 Peck., 133.) The execution, with return filed, all its force and vitality as a process is spent. (*Champerau v. White*, 1 Wend., 92; *Waldron v. Davison*, 15 id., 575; *Dalton on Sheriffs*, 34; *Clark v. Lyman*, 10 Pick., 47 id., 169; *Symond v. Catlin*, 2 Caines, 61.) The mere taking it from the clerk's office imposed no official duty upon the deputy. (*Ex parte Read*, 4 Hill, 672; *Waldron v. Davidson*, 15 Wend., 575; *Moreton v. Moreton*, 5 Barb., 296.) The sheriff is not responsible for the acts of the deputy, unless done in the time of official duty. (*Gorham v. Gale*, 7 Cow., 739; *People v. Schuyler*, 5 Barb., 166.) The deputy, in making sale, did not act by virtue of his office; the return made is conclusive. (*Dalton on Sheriffs*, 134; *Clarke v. Lyman*, 17 Peck., 47, 169.) The execution could not be taken from the files without the order of the court. (*Barker v. Berminger*, 14 N. Y., 278.) His act in doing so and subsequent proceedings, were as the agent of the plaintiff and not on behalf of the sheriff. (*Moulton v. Morton*, 8 Barb. R., 286; *Gorham v. Gale*, 7 Cow. R., 739; *Corning v. Sutherland*, 3 Hill, 552.)

*L. Hasbroock, Jr.*, for respondent. If there was anything wrong in taking the execution from the file and proceeding under it, it amounted to no more than a mere irregularity, and of that the sheriff cannot take advantage. (*Kimball v. Munger*, 2 Hill, 365; *Berry v. Riley*, 2 Barb., 307; *Smith v. McGowan*, 3 Barb., 405; *Mickles v. Tousley*, 1 Cow., 114; *Wolden v. Davidson*, 15 Wend., 579; *People v. Dunning*, 1 Wend., 16.)

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Opinion of the Commission, per EARL, C.

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EARL, C. After the deputy sheriff Houghton had returned the execution in the case of *Robinson & Parsons v. Thomas B. James* to the clerk's office, by the consent of the attorney for the plaintiffs therein and of the county clerk, he procured the same from the clerk's office and erased therefrom the return he had made thereon. He then made the levy and sale, and realized the money recovered in this action. He levied upon and sold the property, claiming to act as deputy sheriff.

This execution was not absolutely void in the hands of the deputy. It was still process of the court, and was merely irregular. The court, upon application of the deputy sheriff, could have authorized its withdrawal from the clerk's office and the cancellation of the return and filing, and it would then have been valid and regular process in his hands. (*Barker v. Bininger*, 14 N. Y., 271.) And even after the second return of this process the court could, *nunc pro tunc*, have canceled the first return and filing, and thus validated the other proceedings under the execution. All this shows that the process was not absolutely void. If it was, the court could not validate it.

Hence, the deputy sheriff realized this money upon process simply irregular; and this being so, the defendant, as sheriff, is liable for it. In *The People v. Dunning* (1 Wend., 16), a deputy sheriff collected money upon an execution which had been issued without seal. The deputy kept the money and was insolvent. The court say: "The only question is, whether the process is void or erroneous? The sheriff supposed it void, and that the sureties of the deputy were not responsible to him for the money received on the execution. This is a mistake. The process was erroneous and not void, and, therefore, amendable; and the money having been received by the deputy, *colore officii*, his sureties are liable, and the sheriff is responsible to the plaintiff. The party not having applied to set aside the execution, the sheriff cannot avail himself of any defects in it, and must pay the money or stand committed." In *Walden v. Davison* (15 Wend., 575)

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Opinion of the Commission, per EARL, C.

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the point decided as embodied in the headnote is as follows: "Where the deputy of a sheriff receives an execution commanding, not his principal, but the sheriff of another county, to make the money for which the process issues, the deputy may refuse to execute the writ; but if he does proceed and collect the money, having become possessed of it under color or by virtue of his office, his principal is liable to the plaintiff, for the money thus collected, in an action for money had and received. The execution in such case being avoidable merely, is amendable." The execution, in the body of it, commanded the sheriff of Cattaraugus instead of the sheriff of Allegany, of which Davidson was the sheriff.

In this case the deputy sheriff could have left the execution in the clerk's office and have stood upon the return he had made, and even after he had got it back from the clerk's office he could have refused to have acted under it on the ground that it would not protect him as against the defendant in the execution. But having taken the execution and acted upon it, he cannot now set up its irregularity. Having treated it as valid process, neither he nor his principal can refuse to answer for the money.

It is not true, as claimed by the learned counsel for the appellant, that a sheriff is not liable for acts of his deputy done by *color* of his office merely, and that he is liable only for those acts of his deputy which he does strictly by *virtue* of his office. The true rule is laid down by Mr. Justice BRONSON, in *Walden v. Davison*, *supra*, as follows: On ascertaining whether the sheriff is answerable for the acts of his deputy, the question is whether the latter did an official or mere personal act. If the act is personal only, and does not relate to his duty as an officer, he is not the agent or servant of the sheriff; but if he execute process under color or by virtue of his office, the sheriff is answerable for the consequences. It is not necessary to charge him that the act of the deputy should in all cases be lawful, or one which he might rightfully do under the process, if it were so. The

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Dissenting opinion, per GRAY, C.

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sheriff would not be liable where the deputy takes the property of some other person than the judgment debtor.

Within the rule here laid down, which is fully sanctioned by principle and authority, the sheriff in this case is answerable for the act of his deputy, and must respond for the money in his hands. The judgment should be affirmed with costs.

GRAY, C. (dissenting). I cannot concur in the opinion expressed, that this execution "was not absolutely void in the hands of the deputy." In the case of *Walden v. Davison* (15 Wend., 575), relied upon as authority to sustain it, the attorney who issued the execution had the right to issue it, and the sheriff who received it had the right to receive it; it was not void, but merely irregular, for want of adherence to prescribed rules in issuing it, the result of an innocent mistake; in this case the execution had been returned and filed in the office of the clerk of the proper county, and thus placed beyond the legal control of the attorney who issued it, or the deputy who returned it, having become in all respects *functus officio*; it became then a part of the official duty enjoined upon the clerk to preserve it in the condition in which he received it (1 R. S., 5 ed., 866, § 108), until the court, whose process it was, should otherwise direct. The neglect of this duty (if he permitted the deputy to take it from his files), was a misdemeanor on his part. (3 id., 979, § 53.) And if the deputy, who after procuring the execution from the clerk's office erased his return and the clerk's filing therefrom with intent to defraud, he was guilty of forgery. (3 id., 950, § 25, subs. 1 and 2.) The case is without evidence to show that the defendant was in any way informed of, or that he ever sanctioned these wrong acts of the deputy; and it appears that the deputy retained in his own hands the funds collected, and refused to comply with the plaintiff's demand to pay them over. "Men seldom do unlawful acts with innocent intentions; the law presumes every act in itself unlawful, to have been criminally intended until the contrary appears;" and the burden of disproving a criminal intent is thrown upon the accused.

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Statement of case.

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(2 Bishop on Criminal Proceedings, 615.) The presumption of a criminal intent arising from the unlawful acts, is, in this instance, strengthened by the circumstance of his retaining and refusing to pay over the funds collected, but it is quite unnecessary to determine the degree of wrong committed by him. It is sufficient, to render the execution void, that the act of taking it from the clerk's office and erasing the return indorsed upon it was impliedly, at least, forbidden by law (*Clark v. Lyman*, 10 Pickering, 45, 48), and no more the act of the sheriff, because his deputy proceeded under color of office, than if he had been destitute of process (*ex parte Reed*, 4 Hill, 572, 573), and hence the judgment should be reversed.

For affirmance, EARL, HUNT and LEONARD, CC.

For reversal, GRAY, C.

LOTT, Ch. C., not voting.

Judgment affirmed.

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EVALINE SMITH, Respondent, v. HENRY VAN OLINDA et al.,  
Appellants.

One who furnishes the credit, and in whose name a business is carried on, is the legal owner of the property purchased upon his credit and employed in the business, although the beneficial interest in the business is in another.

In an action for conversion of personal property, defendants justified under a judgment and execution against a third person who carried on business in plaintiff's name, as her agent, and with materials and labor purchased and procured upon her credit. The property levied upon was thus manufactured. Upon the trial defendants offered to prove that plaintiff allowed the execution debtor to use her name and credit to carry on business for his sole benefit. The court excluded the evidence. The court also refused to submit to the jury the question whether such an arrangement was fraudulent and void as to creditors.

*Held*, no error; that no fraud could be deduced therefrom. (*Booth v. Bunce*, 24 N. Y., 592, distinguished.)

(Argued May 10th, 1871; decided September term, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial district, affirming a judgment in favor of plaintiff entered upon a verdict.

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Statement of case.

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The action was to recover for the alleged wrongful conversion of a wagon by the defendants.

The defendants denied the allegations of the complaint, and alleged the recovery of a judgment in the Supreme Court, in favor of Van Olinda against James H. Smith and George Smith, in 1862; an execution issued thereon, and delivered to the defendant Davis, as a deputy sheriff, under which the wagon was levied on and sold as the property of James H. Smith.

At the trial, it appeared that the plaintiff rented a shop, and purchased the necessary tools and stock to carry on the business of wagon making, on her own credit, in 1860, giving her notes for the amount, which were afterward paid out of the income and earnings of the business. James H. Smith was employed as the agent of the plaintiff, to superintend and carry on the business, under an agreement with the plaintiff, who was his step-mother, that he should have for his services a good living out of the business. He made all the purchases, employed workmen and collected the debts due, as the agent of his mother, and in her name, and applied the income to the payment of her liabilities contracted in the said business. She was possessed of property and credit. The wagon levied on was built at the shop, with stock and materials so purchased. On the part of the defendants it appeared in evidence that said James had been engaged in the same business on his own account, prior to 1860, and failed; that the debt due to the plaintiff was contracted prior to that date; that the plaintiff had put into the business no money except the sum of fifteen dollars, which the said James had obtained from her to make up a sum when he went to Albany to make some purchases for the business; that she had not received anything from the business; that no account was kept of the money received in it, and none was rendered to the plaintiff; that the business amounted to \$1,000 or \$2,000 a year; nothing was said as to what was to be done with the income over and above the living of the said James; that he had paid out all



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Opinion of the Commission, per LEONARD, C.

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that had been received for labor employed, rent of the shop, and the tools and stock purchased, and his own expenses.

It also appeared on the part of the plaintiff, that the entire earnings did not exceed the amount of her liabilities.

The recovery of the judgment, the issuing of the execution, and the levy thereunder were admitted. It was also admitted that the defendant Davis was deputy sheriff, and acted under the said execution, and that Van Olinda was the plaintiff therein and directed the said levy.

The defendants then offered to prove that the plaintiff gave James H. Smith the right to carry on the business of wagon making and blacksmithing, in her name, and on her credit, for his sole benefit, and claimed that its effect was to hinder, delay and defraud the creditors of said Smith. The court sustained an objection thereto by the plaintiff, and the defendants excepted.

The defendants asked to have the question submitted to the jury, whether the arrangement between the plaintiff and James H. Smith was not fraudulent and void as against his creditors. The court denied this request, and the defendants excepted.

The jury rendered a verdict for the plaintiff for \$125, for which sum, with costs, judgment was entered against the defendants.

*H. B. Cushney* for the appellants. The arrangement between plaintiff and James M. Smith was a mere cover, and fraudulent and void as to creditors. (*Booth v. Bunce*, 24 N. Y., 592, 595.) The question of fraud is for the jury. (*Bishop v. Cook*, 13 Barb., 326; *Wakeman v. Dalley*, 44 Barb., 498, 503; *Thompson v. Blanchard*, 4 N. Y. R., 303; *Ford v. Williams*, 24 N. Y. R., 359.)

*J. M. Carroll* for the respondent. The arrangement was not fraudulent. (*Buckley v. Wells*, 33 N. Y., 518.)

LEONARD, C. I am unable to perceive any error in this case. The case of *Booth v. Bunce* (24 N. Y., 592) is much

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Opinion of the Commission, per LEONARD, C.

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relied on by the defendants' counsel. There the execution creditor, who had levied on and purchased the property in question, offered to prove that the corporation, from whose possession it was taken, was organized to defraud the creditors of the debtor in the execution. The Court of Appeals held that it was error to exclude such evidence.

The question in this case is not at all the same. Here the offer was to prove that the plaintiff allowed the execution debtor to use her name and credit to carry on business for his sole benefit. There is no fraud in such facts, nor can any be deduced from them. She might have allowed the use of her name and capital, giving the whole profits to her step-son, without any injury to his creditors. If he acquired any property thereby, it would belong to his creditors, but clearly not her property which the step-son or debtor was allowed to use. It is the same with property acquired on her credit. The property so acquired belongs to her.

If there is any evidence showing fraud or a fraudulent intent, the case must go to the jury; but I am entirely unable to discover any facts in this case that would support any such conclusion. It is not in question by any fact in the case that the wagon levied on was made with materials and labor procured on her credit. She was the owner of the wagon, and there was nothing in the evidence on which the jury could find her title to be fraudulent. The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

CASES DECIDED  
IN THE  
COMMISSION OF APPEALS  
OF THE  
STATE OF NEW YORK,  
AT THE JANUARY TERM, A. D. 1872.

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MALVINA T. FONDA, Respondent, *v.* SPARROW S. SAGE et al.,  
Appellants.

To constitute a cloud upon title, it is sufficient that there be a deed, valid upon its face, accompanied with a claim of title, under such circumstances that a court of equity can see that the deed is likely to work mischief to the real owner. It is not necessary in order to maintain an action to remove the cloud and quiet the title, that the claimant should have a *prima facie* record title, which the real owner must call in extrinsic evidence to overthrow.

Plaintiff purchased and paid for certain real estate, directing the vendor to execute to her a deed conveying the same to her, with a proviso therein, that if her son should pay her \$200 per year during her life, he should have the property after her death. By mistake, the deed was so drawn as to grant the land to her in trust for her son, upon certain conditions, not being a trust recognized by the statute of uses and trusts. Plaintiff received the deed without examination, and did not discover the mistake for several months thereafter. When she did discover it, with the concurrence of her son, who refused to take under the deed, she returned it to her grantor, when the same was destroyed, and a new deed was executed and delivered to her, conveying the premises in fee; subsequently the premises were levied upon, advertised and sold, under an execution against the son. The purchaser at the sheriff's sale claimed that the son had the title to the premises or an interest therein, which he had purchased, and this he threatened to enforce.

## Statement of case.

*Held*, that there was not a valid and effectual delivery and acceptance of the first deed, so as to pass the title; that the son had no interest in the premises, and that an action to quiet the title could be maintained.

Even if there was such a delivery, and the mistake could not be corrected without the aid of the court, the plaintiff remained the equitable owner, with rights superior to the purchaser at the sheriff's sale; and with all the necessary parties before it, the court could, in an action brought to quiet the title, establish plaintiff's title under the second deed, and annul any claim of title under the first.

(Argued September 19, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the seventh judicial district, affirming a judgment entered in favor of the plaintiff upon the report of a referee.

The action was brought to remove a cloud upon plaintiff's title to certain real estate in the county of Livingston. It is reported below, in 46 Barb., 109. The material facts as found by the referee are as follows: That the plaintiff agreed with her father, Samuel T. Vary, for the purchase by her of the premises described in the complaint, in September, 1857; that after this agreement and before it was executed, she directed Vary to convey the premises to her, but to insert in the conveyance a clause "to the effect that, providing said Franklin J. Fonda, her son, should pay her the sum of \$200 annually during her natural life, then he should have and own said premises after her death;" that plaintiff paid the purchase-money wholly out of her own funds; that subsequently, and in December, 1857, Vary and wife executed and delivered to the plaintiff a deed of the premises, in trust for Franklin J. Fonda, on condition that he should pay her \$200 annually during her life, and in case of default the conveyance should become null and void, and "Franklin J. Fonda should forfeit the right and title in and to said premises;" that the plaintiff was ignorant of the contents of this deed, and remained so until July, 1858, at which time Franklin J. Fonda examined it, refused to comply with its conditions, and advised the plaintiff to get from her father another deed.

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Statement of case.

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Thereupon, with the consent of Samuel T. Vary, the deed was returned, canceled and destroyed, and a new deed executed, conveying to her the premises without condition. This deed was recorded in September, 1858. That the first deed was never recorded; that Franklin at the time of its execution was a minor, but when he repudiated it was in his twenty-first year. He never took possession of the premises, or claimed any right therein, nor did he ever pay or offer to pay the \$200 annually or any part thereof. He also finds that the defendant, Helen T. Fonda, on the 24th of March, 1862, recovered a judgment against Franklin, which would be a lien upon the premises in question if he was the owner of the land. That defendants caused an execution to be issued, and, claiming that he had an interest in the premises liable to sale, sold the same under the execution; that the defendants claim that by virtue of the first deed by Vary, above referred to, Franklin J. Fonda became and was the owner of the premises, or that he had some interest therein liable to be sold on execution; that upon the sale by the sheriff, the premises were bid off by Sparrow S. Sage, and the sheriff's certificate executed, which was filed and recorded; that on the 14th of August, 1863, the plaintiff requested the defendants to release their claim upon the premises acquired as above, but they refused to do so, and Sparrow S. Sage then insisted that he was entitled to a deed, and should procure one from the sheriff, in consequence of the said sale; that proof of the contents of the first deed can only be made by a few witnesses; that Samuel T. Vary, the most important, is aged and not likely to survive many years (he has since died). Calvin Vary, who drew the deed, and the officer who took the acknowledgments, are both dead. The referee found as conclusions of law: 1st. That the plaintiff is, and ever since the making and delivery of the last above mentioned deed executed by Samuel T. Vary and his wife to her has been, the owner in fee simple of the premises described in the complaint. 2d. That said Franklin J. Fonda has no title to or interest in said premises. 3d. That the sale of said premises by said

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Statement of case.

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sheriff to the said Sparrow S. Sage did not vest in him any title to or interest in said premises; but that such sale and the making and filing the sheriff's certificate thereof, in connection with the fact of the making and delivery and destruction of said first above mentioned deed, and the dispute about its contents, does constitute a cloud upon the plaintiff's title to said premises, and puts her title in jeopardy, and also constitutes a serious obstacle in the way of her selling said premises. 4th. That the plaintiff is entitled to judgment in this action, declaring that the said judgment, so as aforesaid recovered by said Helen T. Fonda against said Franklin J. Fonda, is not, and never has been, a lien upon said premises; that said Franklin J. Fonda did not own said premises or have any interest therein at the time when said judgment was recovered and docketed, or at any time thereafter, but that the plaintiff is the sole owner of said premises in fee simple; that said Sparrow S. Sage did not acquire any title to or interest in said premises by his purchase at said sheriff's sale thereof upon said execution, but that such sale and the certificate thereof, and the filing of such certificate as herein stated, constitute a cloud upon the plaintiff's title and put such title in jeopardy; that such sale and certificate thereof be vacated and set aside; that said sheriff be restrained from making or delivering, and that said Sparrow S. Sage and his assigns be restrained from receiving any deed from said sheriff in pursuance of said sale of the said premises; that said Sparrow S. Sage be enjoined from selling or assigning said certificate of sale, and that the plaintiff be quieted in her said title.

Judgment was entered accordingly.

The appellants filed proper exceptions to the findings and decisions of the referee.

*G. D. Lamont* for appellants. Upon the facts, there is no cloud on plaintiff's title for which a court of equity will grant relief. (*Ward v. Dewey*, 16 N. Y., 519; *Cox v. Clift*, 2 Comst., 118; *Hotchkiss v. Elting*, 36 Barb., 38; *Wood v. Seley*, 32 N. Y., 105; *Scott v. Onderdonk*, 14 id., 9, 14; *Hey-*

## Statement of case.

*wood v. Buffalo*, id., 534; Willard's Eq., 306.) The law imputes indisputable notice of the contents of a deed to a party in possession under it. (Story's Eq., §§ 399, 400; 5 Johns. Ch., 29.) Parol proof of contents of deed cannot be given where its destruction was voluntary. (*Livingston v. Rogers*, 2 Johns. Cas., 488; *Farrar v. Farrar*, 4 N. H., 191; 2 Cow. & Hill's Notes, 1216, 1217; *Jackson v. Frier*, 16 Johns., 193; 2 Johns. Cas., 488, above cited; Greenl. Ev., § 558.) The material alteration or total destruction of a deed by the grantee will not divest the estate. (*Lewis v. Payne*, 8 Cow., 71; *Jackson v. Gould*, 7 Wend., 364.) But the party thereby loses all right of action on any covenants contained in it. (2 Stark. Ev., 271; Greenl. Ev., § 558; *Blade v. Holland*, 12 Wend., 173; Broom's Leg. Max., 843; Francis' Max. in Eq., 9; *Wardour v. Berisford*, 1 Vernon, 452; *Riggs v. Taylor*, 9 Wheat., 483; *Remur v. Bank of Columbia*, id., 596; 1 Ch. Cases, 293; Francis' Max., 8.) The trust deed vested the title in Franklin. (2 R. S., 153, § 20.) Her possession was as guardian in socage, and for the benefit of her ward. (*Holmes v. Seeley*, 17 Wend., 75-78; *Byrne v. Van Hoesen*, 5 Johns., 66; *Jackson v. De Walts*, 7 id., 157; *McCray v. McCray*, 30 Barb., 633; *Sylvester v. Ralston*, 31 id., 286.) By the destruction of the deed, the title stands vested in Franklin, freed from the condition. (Story's Eq., § 568; 2 Cow. & Hill's Notes, 1216.) A bill *quia timet* cannot be sustained in a case of this character. (Story's Eq. Jur., chap. 22, treating of bills *quia timet*, chap. 23 of bills of peace; Adams' Doctrine of Equity, 199-209; Willard's Eq. Jur., 328, etc.; Mitford's Pl., 148, and note 1; *M. A. Bap. Ch.*, 26 How., 72; *Armitage v. Palmer*, 37 N. Y., 497; *Heyward v. City of Buffalo*, 14 id., 537, 540; *Mann v. Fairchild*, 2 Keyes, 106; *Bryant v. Bryant*, 42 N. Y., 11, 18.) This court can only look at the facts found by the referee. (*Bergen v. Wemple*, 31 N. Y., 319; *Johnson v. Whitlook*, 13 id., 344; *Smith v. Devlin*, 23 id., 365; *Buckingham v. Payne*, 36 Barb., 87; *Mosher v. Hotchkiss*, 3 Keyes, 161. His findings of fact cannot be reviewed, unless there is no evidence to

## Opinion of the Commission, per EARL, C.

sustain them. (*Fellows v. Northrop*, 39 N. Y., 119; *Mason v. Lord*, 40 id., 484; *Putnam v. Hubbell*, 42 id., 112.) The first deed was delivered and accepted as an executed conveyance. (*Brackett v. Barney*, 38 N. Y., 333; *Worrell v. Munn*, 1 Seld., 229; *Gilbert v. N. A. Fire Ins. Co.*, 23 Wend., 45, 46.) The grantor's whole title was divested thereby. (*Van Der Volgen v. Yates*, 5 Seld., 219.)

*George F. Danforth* for respondent. The judgment should be sustained to prevent mischief. (*Baker v. Shebury*, Cases in Chancery, p. 69, case 70; Freeman's Ch., 183; *Mayor of Colchester v. Lowten*, 1 Ves. Bea., 244; *Hayward v. Drinsdale*, 17 Ves., 112; *Jackman v. Millan*, 13 id., 587; *Hamilton v. Cummings*, 1 Johns. Cas., 517; Story's Eq., § 200; *Scott v. Onderdonk*, 14 N. Y., 14; *Ward v. Dewey*, 16 id., 522; *N. Y. and N. H. R. R. Co. v. Schuyler*, 17 id., 592; *Wood v. Seeley*, 32 id., 113.) Defendants' claim itself, and acts under it, constitute such a cloud upon the title as entitles the plaintiff to come into this court on the equity side to anticipate and prevent the defendants' further proceedings. (See cases above cited; also, *Cook v. Newman*, 8 How. Pr., 523; *Kimberly v. Sells*, 3 Johns. Ch., 467; *Petit v. Shepherd*, 5 Paige, 493-501; *Radcliff v. Rowley*, 2 Barb. Ch., 23.) Defendants are estopped from saying that the court has not jurisdiction. (*Grandin v. Le Roy*, 2 Paige, 509; *Le Roy v. Platt*, 4 id., 77; *Bank of Utica v. Mersereau*, 3 Barb. Ch., 529; *Prescott v. King*, 6 Seld., 165; *Livingston v. Livingston*, 4 Johns. Ch., 287; *Cumming v. Mayor*, 11 Paige, 596; *Clarke v. Sawyer*, 2 N. Y., 498; *N. Y. and N. H. R. R. Co. v. Schuyler*, 34 id., 30; *McKeon v. Sea*, 4 Robt., 449; *Davis v. Morris*, 36 N. Y., 569.)

EARL, C. It is claimed by the counsel for the appellants that, upon the facts of this case, an action to remove a cloud upon the title to land cannot be maintained; and this raises the principal question for our consideration.

It is impossible to lay down rules which will cover all the



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Opinion of the Commission, per EARL, C.

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cases in which a court of equity will interpose its jurisdiction to remove a cloud upon the title to real estate. This jurisdiction does not rest upon any arbitrary rules, but depends upon the facts of each case; and whether it shall be exercised or not, is generally in the discretion of the equity court. There is one rule, however, which is fully settled and now uniformly followed in this State; and that is, if the instrument claimed to constitute the cloud is void upon its face, a court of equity will not interfere to remove it, because such an instrument can work no mischief; and the same is true, although the invalidity does not appear upon the face of the instrument, if it necessarily appears in some one of the links of title which the claimant would have to establish in order to give the instrument force and effect.

A few cases will illustrate the rule. In *Cox v. Clift* (2 N. Y., 118), it was held, that inasmuch as a purchaser at a sale by the attorney-general, under a mortgage executed to the people of the State, must claim through the advertisement and the sale, although the deed given in pursuance of such sale should profess to convey land embraced in the mortgage but not included in the advertisement and sale, there was no occasion for the owner of such land to resort to a court of equity to remove the cloud from his title.

There are cases of tax deeds which were an apparent cloud upon title, in which the courts refused to interfere, because it would be necessary for the claimants under the deeds to prove certain preliminaries which would show the deeds to be invalid. But when the statute makes such a deed *prima facie* evidence that a valid assessment has been made, a court of equity will remove it, in a proper case, as a cloud upon title. (*Scott v. Onderdonk*, 14 N. Y., 9; *Hatch v. City of Buffalo*, 38 id., 276.) In *Ward v. Dewey* (16 N. Y., 519) a father died seized of real estate, leaving two children, his heirs-at-law, who became tenants in common of the real estate. One of them executed a mortgage upon the whole real estate, and it was held that this did not create a cloud upon the title of the co-tenant which a court of equity would remove, for

## Opinion of the Commission, per EARL, C.

the reason that a claimant under the mortgage title would have to prove the seizin of the father and the descent to the two heirs, and it would thus necessarily appear that the mortgage was only a lien upon an undivided half of the real estate. In *Wood v. Seely* (32 N. Y., 105) a testator, by will, authorized his executors to sell his real estate; and in case they did so, the will gave to his widow the use of one-third of the proceeds of such sale. The executors sold the real estate, and the widow accepted and enjoyed the use of the proceeds of such sale for a number of years. Afterward she proceeded to procure the admeasurement of dower in the real estate, and threatened to bring ejectment to recover the same. It was held that she was estopped from setting up any claim to dower in the land in the hands of an innocent grantee who was permitted to receive the title to such land in her presence, with the assurance that her claim to dower therein was extinguished, and that she should be perpetually enjoined from enforcing her claim. It was held that the proceedings on her part, constituted a cloud upon the title to the land, which justified the commencement of an action to quiet the title, for the reason that she could at all times make out her claim to dower by proving the seizin of her husband, his death, and the proceedings for admeasurement.

In the light of these cases, it seems to me quite clear that this is a case where an action to remove a cloud upon title is maintainable. The defendants Sage and Fonda claim that the deed executed in December, 1857, by Vary was in such form, and so delivered as to vest some interest in the land in Franklin J. Fonda, and this interest Sage claims to have purchased at the sheriff's sale, under the execution against him, and he threatens to perfect and enforce his title. His certificate and deed will not be void upon their face. They will be in the usual form and apparently valid. Their invalidity will not necessarily appear in anything which Sage will be obliged to prove in order to assert his title against the plaintiff. To assert his title he would have to prove the execution and delivery of the deed from Vary to the plaintiff, in

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Opinion of the Commission, per EARL, C.

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trust for Franklin J., and the judgment execution and sale, and, having done so, he would be entitled to recover unless the plaintiff could avoid the effect of that deed by showing that it was destroyed, and a new deed taken, under such circumstances as to leave no interest in the land in her son and to vest the whole title in her. These circumstances are not matters of record but rest in parol, and some of the witnesses to them are dead, and others are aged. Under such circumstances, how can it be said that the deed from the sheriff, with an assertion and claim of title under the deed from Vary, would be entirely harmless? It has never been held that, to constitute a cloud upon title, there must be a title upon record apparently valid. It is sufficient if there be a deed, valid upon its face, accompanied with a claim of title based upon facts showing an apparent title under such circumstances that a court of equity can see that the deed is likely to work mischief to the real owner of the property. In such a case the court will exercise its preventive justice upon the doctrine *quia timet*, and will quiet the title.

The only other question to be considered is whether Franklin J. Fonda, by the deed of December, 1857, acquired any interest in the land which the defendant Sage purchased at the sheriff's sale. The court at General Term held, upon the facts found by the referee, that the deed was never delivered to and accepted by the grantee, so as to divest the grantor of his title. This conclusion was reached by holding that neither the plaintiff nor Franklin J. Fonda had ever really accepted the deed as it was drawn. But I prefer to place the decision of this question upon other grounds. The plaintiff purchased and paid for the land with her own means, and directed Vary to make and execute to her a deed conveying the land to her, with a provision that if her son should pay her \$200 per year, during her life, he should have the property after her death. But the deed was so drawn, by mistake, as to grant the land to her in trust for her son upon the conditions found by the referee. When she and her son learned of the contents of the deed, he declined to accept the

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Opinion of the Commission, per HUNT, C.

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same or comply with the condition therein mentioned, and with his assent she took the deed to Vary and informed him of the mistake, and demanded and received a new deed, and canceled and destroyed the first one. This was nearly four years before Helen Y. Fonda recovered her judgment; and although Franklin J. Fonda soon thereafter came of age, he never claimed any interest in the land, and never paid or offered to pay the \$200 per year mentioned in the deed. By the payment of the purchase-money, the plaintiff became the equitable owner of the land, and she had the right to dictate who should have the beneficial interest therein, and until her intention had been effectuated so as to vest an interest in her son the title was within her control, and she could give it any direction she chose. When she found that the deed was so drawn by mistake as not to carry out her intention, even if it had gone so far that she could not correct the mistake by destroying the deed and taking another, she could have invoked the aid of the court to cancel and set aside the first deed, and establish her right under the second. Upon all the facts as they appear, she remained at least the equitable owner of the land, with a right superior to that of Sage acquired under the sheriff's sale; hence the court in this suit, with all the necessary parties before it, can establish the plaintiff's title under the second deed, and annul any claim of title under the first deed.

I have, therefore, reached the conclusion that the judgment should be affirmed, with costs.

HUNT, C. Upon the merits of this case I find but little difficulty. The plaintiff purchased the land in question of her father, and paid for it with her own money. By an error of the draftsman, the deed delivered to her conveyed the property to her in trust for her son, upon certain conditions. Not being a trust recognized by our statute, it is said that this vested the title in the son. The plaintiff was ignorant of the contents of the deed, and did not make the discovery for several months. When discovered, she returned

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Opinion of the Commission, per HUNT, C.

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the deed to her grantor and demanded that one should be made conveying the title to her, according to the original agreement. This was with the concurrence of her son, who refused to take under the conditions of the deed as originally drawn. At this time no person had any claim against the son. The claim of the defendants against him did not arise until nearly four years thereafter, and none was anticipated at this time. The original deed was, therefore, destroyed and a new one made, under which the plaintiff has ever since held the property. The son was at this time under age, but soon reached his majority, and has never since accepted the deed or a title under it. Under these circumstances, I agree with the learned judge who delivered the opinion of the court below, that the first deed was never so delivered as to transfer the title to the grantee therein named. There was a delivery, in fact, as found by the judge, but not a valid and effectual delivery, which passed the title. The deed was not what the grantee understood and expected it to be. No other rights intervened, and the parties were at liberty to cancel the first deed and to make another, according to the agreement between them.

I have had some doubt whether an action to remove an alleged cloud upon the title could be maintained under the circumstances of this case. It is argued that such an action can only be sustained where the claimant has a *prima facie* record title, which the real owner must call in extrinsic evidence to overthrow. If the same record which is relied on to establish the claimant's title will of itself show that he was not such owner, then the action cannot be sustained. In the case before us there is no record evidence of the original title under which the defendants claim. To establish a title, they must give parol evidence of the execution and delivery and contents of the first deed. This they claim to be able to do, and evidence on that point was given by them on the trial of this action. In such a case, is the owner at liberty to anticipate the controversy, compel a trial and decision when he is prepared to meet it and has his evidence at hand, or must he

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Opinion of the Commission, per HUNT, C.

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wait the motion of the claimant, and be confined to a defence to an action thereafter to be brought, when the claimant is ready and his own witnesses may be scattered or dead? The court below held that he might anticipate the contest and compel a determination when he was himself prepared to meet the question.

A distinction is sometimes made between controversies involving the title to real estate and those involving only the title to chattels, or a claim of personal responsibility. A claim of the latter class it is supposed will inflict but little injury, while in the former case the value of real estate may be seriously impaired by such a cloud upon the title. Whether courts of equity will interpose to set aside a bill of exchange, promissory note or bond, etc., to which there is perfect defence at law, has been much doubted. (See *Ward v. Dewey*, 16 N. Y., 525, SELDEN's opinion.) The fact that there is a perfect defence at law is not regarded as an objection to seeking relief in equity, where the title to real estate is involved. (Id.) The question in such case is, simply, does the claim create a cloud upon the title? An examination of the cases in the courts of this State sustains the conclusion that a claim like the one made by these defendants does create such a cloud. In other words, it is not necessary, to give jurisdiction, that the claim should be based upon record evidence, which record evidence gives *prima facie* evidence of title in the claimant. It is sufficient that the sheriff's deed to these claimants may be made the source of good title to them, when aided by parol proof of an unrecorded deed to the defendants in the execution. Thus, in *Ward v. Dewey* (*supra*), PRATT, J. (p. 523), in discussing the law, puts the case that the purchaser under a mortgage foreclosure should bring an action to obtain possession of the premises. Title, he says, must be proved in the mortgages. Without proof of such title, there could be no cloud. In the case before him he asserts that such attempted proof would immediately show that there was no title. The defect in the claimant's title would at once appear from such attempt. Hence he

holds, and with him the court, that the action could not be maintained. It is a legitimate conclusion from this reasoning that, if such proof on the part of the claimant would have shown title in the mortgagors, the action to remove the cloud would have lain. Such is the fact in the case now in hand. The claimant's proof showed a title in the son, under whom they claim. In 1858, Mr. Vary executed and delivered a deed, which, in its terms and by law, passed the title to the son. Proof of this would be all that the claimants would require, and all that they would give to make out their title. The subsequent evidence by which an error was established, the deed surrendered and a new one given, would be new matter, to be established by different witnesses, and a distinct, independent defence to be made out by the plaintiff as best she might. In the same case of *Ward v. Dewey*, SELDEN, J., says (pp. 529, 530), "It is to be inferred from the cases, as well as from the natural import of the term, that anything is a cloud which is calculated to cast doubt or suspicion upon the title, or seriously to embarrass the owner either in maintaining his rights or disposing of the property." The mere existence of a deed, accompanied by no circumstances giving it apparent validity, he says, would not operate as a cloud upon the title. "But (he adds) it may be safely assumed that when such circumstances exist, in connection with a deed, as not only give to it an apparent validity, but will enable the grantor to make out a *prima facie* title under it, a cloud is created. It cannot be necessary, to constitute a cloud, that the conveyance should be sufficient, *per se*, without being connected with any other evidence, to make out a *prima facie* title, because no conveyance, even if valid, could do this." It is always necessary, he says, to show some sort of title in the grantor. Title from the State must be shown, or possession by the grantor. In all such cases, where title is thus made out by additional proof, he holds that a cloud upon the title is created, which justifies the filing a bill to remove it. Although a dissenting opinion, the argument of Judge SELDEN is marked with his usual ability, and

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Opinion of the Commission, per HUNT, C.

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there was no dissent upon the point from which I have quoted.

In *The N. Y. and N. H. R. R. Co. v. Schuyler* (17 N. Y., 599), COMSTOCK, J., uses this language: "If the invalidity plainly appears on the face of the writing, so that no lapse of time nor change of circumstances can weaken the means of defence, it is held that no occasion arises for a suit in equity to decree its cancellation. And the doctrine now is that such instruments do not in a just sense even cast a cloud upon the title or interest, or diminish the security of the party against whom the attempt may be made to use them. If, on the other hand, the invalidity does not appear on their face, the jurisdiction is not confined to instruments of any particular kind or class. Whatever their character, if they are capable of being used as a means of vexation and vengeance, if they throw a cloud upon title or disturb the tranquil enjoyment of property, then it is against conscience and equity that they should be kept outstanding, and they ought to be canceled."

In *Scott v. Onderdonk* (14 N. Y., 14), after discussing the question generally, DENIO, Ch. J., says: "If, however, the claim is based upon a written instrument which is void upon its face, or which does not in terms apply to the property it is claimed to affect, there seems to be no reason for entertaining a litigation respecting it before it is attempted to be enforced, *for the party apprehending danger has her defence always at hand*. In such a case no action will lie." But in a case like the one before us, the defence is not always at hand. The witnesses may be scattered, the parties may die, and the means of defence depending on the evidence of witnesses be entirely lost. It is plain that the learned judge did not intend to exclude jurisdiction in a case like the present.

In *Crooke v. Andrews* (40 N. Y., 547), Judge WOODRUFF excludes jurisdiction in those cases only where the invalidity of the claim "must appear on the face of the very documents or proceedings on which the alleged claimant must rely, and



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Opinion of the Commission, per HUNT, C.

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which he must produce," citing *Hatch v. City of Buffalo* (38 N. Y., 276); *Allen v. City of Buffalo* (39 id., 386).

In *Wood v. Seely* (32 N. Y., 114), the remarks of COMSTOCK, *supra*, are quoted with approbation, and at page 117, DENIO, Ch. J., says: "The allegations upon which the equity is based rest upon the oral testimony of witnesses who may die or whose testimony it may hereafter be impracticable to procure. In such cases the party expecting to be challenged may take the initiative by bringing an action in the nature of a bill *quia timet*. (*Scott v. Onderdonk*, 14 N. Y., 9.)" The general jurisdiction, to be regulated by circumstances, has been exercised by the courts of this State since the year 1815. (*Hamilton v. Cummev*, 1 John. Ch., 517.) The same principles are laid down in Story Eq. Jur., § 694. The party, it is said, is to be relieved *quia timet*; that is, for fear such securities, deeds or other instruments may be vexatiously and injuriously used against him where the evidence to impeach them may be lost, or that they may never throw a cloud or suspicion over her title. While many of the cases in the books lay down the rule in terms limited to the facts in hand, I find no decision which contradicts the principles which I have quoted. I am of the opinion that in the present case the jurisdiction is sustained, and that the judgment should be affirmed.

All concur.

Judgment affirmed. ✓

## Statement of case.

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119 564LEVI TILLOTSON, Appellant, v. EDMUND W. WOLCOTT,  
Respondent.

A judgment recovered by a debtor against his creditor for an unlawful levy upon, and sale of exempt property, cannot be reached by the creditor through proceedings supplementary to execution. Such judgment represents the property for the value of which it was recovered. The proceeds of the judgment will be protected as exempt property until sufficient time has elapsed to afford the debtor a reasonable opportunity to again purchase the exempt property.

The County Court has jurisdiction to order a receiver appointed by it, in proceedings supplementary to execution, to release to the debtor a judgment recovered by him for an unlawful seizure and sale of exempt property.

(Argued September 20th, 1871; decided January term, 1872.)

APPEAL from an order of the General Term of the Supreme Court in the seventh judicial district, affirming an order of the County Court of Ontario county, directing a receiver of the property of the defendant, Wolcott, appointed in this action under proceedings supplementary to an execution, to release, in favor of said defendant, a judgment recovered by him against Merrick Munger amounting to \$79.77 for damages sustained by said Wolcott by reason of the seizure and sale by Munger, on execution, of a horse belonging to Wolcott, which was, by law, exempt from seizure and sale on execution.

The order was made by the County Court on an affidavit setting forth the recovery of a judgment in a Justices' Court by *Wolcott v. Munger* for the amount and for the cause above mentioned. That Wolcott was a householder, having a family for which he provided; and that the animal, which was one of a team, was necessary in his business as a farmer. That immediately after the rendition of said judgment the said plaintiff, Tillotson, obtained an order on proceedings supplementary to execution, granted by the said county judge, whereon the said Wolcott was examined and disclosed the recovery of the said judgment in his favor against Munger.

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Opinion of the Commission, per LEONARD, C.

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That a receiver of the goods, etc., of Wolcott, had been appointed by the said county judge, and the said receiver had collected the judgment recovered by Wolcott for the cause aforesaid. That a full statement of the cause for which the said judgment had been rendered had been made to the receiver on behalf of Wolcott, and the money had been demanded of him, but he had refused to restore it. The deposition of Wolcott, made on his examination in the supplementary proceedings, was also appended to the moving papers, from which the recovery of the judgment against Munger for the cause aforesaid fully appeared, and also the claim of exemption.

*H. O. Chesebro*, for the appellant.

*Edwin Hicks*, for the respondent.

The County Court had jurisdiction to make the order. (*In the Matter of Van Allen*, 37 Barb., 225; *Dickinson v. Van Tyne*, 1 Sand., 724; *Riggs v. Whitney*, 15 Abt., 388; *Getty v. Campbell*, 2 Rob., 664.) The judgment was exempt property. (*Andrews v. Rowan*, 28 How., 106.)

LEONARD, C. There was no dispute as to the validity of the claim of Wolcott, that his horse was exempt from levy and sale under execution, according to the provisions of the Revised Statutes, directing the exemption of household furniture, working tools and team owned by a person who being a householder, or having a family for which he provides, to the value of \$250, and food for the team not exceeding ninety days; provided that the exemption shall not operate against a demand for the purchase-money of such articles.

The judgment of Wolcott against Munger, which Tillotson sought to reach by proceedings supplementary to execution, was recovered for the value of a horse so exempt. The plaintiff, Tillotson, claims to have the said judgment against Munger or its proceeds applied to the satisfaction of his judgment

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Opinion of the Commission, per LEONARD, C.

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and execution in this case, on the ground that the character of the property has been changed, by the recovery of damages for the illegal taking of the horse against the claim of Wolcott for its exemption, although such change had been made against the will of Wolcott, and in defiance of its exemption under the statute. His claim, is in effect, that although the horse was exempt, the judgment recovered for its value, after a wrongful taking by a third person, is not included or embraced in the statutory exemption. We have not been referred to any precedent or decision as a direct or controlling authority upon this question. It is the policy of the statute that a householder, or person providing for his family, may hold property of a certain description useful to him in acquiring a support for his family to the value of \$250, as exempt from the claims of creditors. Public policy requires such a construction of the statute as will insure its full benefit to the debtor. It would be useless to grant the privilege contained in the statute, if it could be rendered of no effect by refusing an adequate remedy for the invasion of the exemption; or by permitting a recovery, when obtained for such invasion, to be wrested from the debtor by proceedings on behalf of his creditors. The judgment, when recovered by the debtor for the wrongful invasion of his privilege of the exemption of his property from levy and sale, represents the property for the value of which it was recovered. He can make another investment of the money to be recovered in the same description of property, in the possession of which, as a householder or person providing for the support of his family, the statute will again protect him. An unreasonable or unnecessary delay in reinvesting the money in exempt property would justly affect the question. The proceeds of the judgment should be held to be protected under the statute, as exempt property, until sufficient time has elapsed to afford the debtor a reasonable opportunity to again purchase the description of property necessary to enable him to support his family, and in the possession of which the law will protect him as against the claims of creditors. The

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Opinion of the Commission, per EARL, C.

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observations of Justice GROVER, in the case of *Andrews v. Rowan* (28 How., 126), are exceeding forcible, and justly commend themselves to our acceptance.

It is also said by counsel for the appellant, that the County Court had no jurisdiction to make the order. This objection is not well founded. The property of a judgment debtor, exempt from execution, cannot be applied to the satisfaction of the demand of a judgment creditor by an order of the judge before whom proceedings supplementary to an execution are pending. (Code, § 297.)

The receiver is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded, or if the judgment is upon a transcript from a Justices' Court, filed in the county clerk's office, then he is subject to the direction and control of the County Court. (Code, § 298.)

These provisions point out the duty of the County Court or judge in a proper case. The direction and control so conferred on the County Court must be enforced according to the powers and duties of courts of equity applicable to receivers in other cases. The court will not permit its receivers, who are officers of the court, to exercise their power illegally or oppressively.

The order appealed from should be affirmed with costs.

EARL, C. The proceeding supplementary to execution is of an equitable character. It takes the place of the creditor's bill as formerly used in Chancery, and is conducted upon equitable principles. The judge before whom it is pending should not permit it to be used for the purpose of oppression, or to subvert the policy or defeat the spirit of the law. Hence I am quite clear that the judge did not err in ordering the receiver to relinquish the judgment recovered by the respondent for his exempt property. Suppose the plaintiff had commenced a suit in equity, in the nature of a creditor's bill, to reach this judgment, and a judge sitting in the equity court had decided that the plaintiff could not reach or have

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Opinion of the Commission, per LOTT, Ch. C.

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the proceeds of the judgment, for the reason that it was recovered for exempt property, and that the exemption of the statute should follow, and upon equitable principles attach to it, would any court of review feel called upon to reverse his decision? On the contrary, a decision appropriating the judgment to the pursuing creditor could not be upheld. Equity would not tolerate such manifest injustice and oppression, or that the spirit and policy of the law should be thus subverted.

The order should therefore be affirmed, with costs.

LOTT, Ch. C. I concur in the affirmance of the order appealed from in this case, on the ground that the order of the county judge affirmed thereby was properly made, in the exercise of his control over the receiver, upon the peculiar facts disclosed on the motion before him.

I, however, do not assent to the doctrine that a judgment recovered against a party or an officer for an unlawful levy on and sale of property exempt by law from levy and sale under execution cannot in any case be reached by a creditor who was not a party or privy thereto, or interested therein, and who in good faith seeks to apply it to his own debt. Such a judgment is not only for the *value* of the exempt property, but includes also the *cost* of the action, which, in many cases, might and probably would exceed such value. Cases may also arise where the exempt property had been replaced by the judgment debtor, on a purchase with money beyond the reach of an execution, by other property of the same character, and for which he had received the benefit of the exemption allowed by law, as against the execution of such other creditor. In that case it would not be proper to give him an additional exemption also for the judgment recovered for the wrongful levy. A court of equity can, by the control it has over a receiver appointed by it, always do justice to a party really and in fact aggrieved by a proceeding instituted to reach the value of the exempt property included in such judgment,

## Statement of case.

where the particular and peculiar facts to warrant it are specially presented.

The present case appears to be of that character.

All concur for affirmance.

Judgment affirmed.

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JAMES S. THOMAS, Appellant, v. CHARLES BARTOW AND WIFE,  
Respondents.

JAMES STICKNEY, Appellant, v. Same Respondents.

In an assignment of an executory contract for the sale of land, there is no implied covenant on the part of the assignor of title to the land in the vendor; all that can be implied is a warranty that the assignor owned the contract, and had the right to assign it, and that the signatures thereto are genuine.

Where the vendor's relation to the title is such that it is possible and feasible for him to perform the contract, and the assignee is placed in such a relation thereto that he can compel performance, the latter cannot repudiate a contract made by him in consideration of the assignment on the ground of failure of consideration.

A party coming into a court of equity, and asking relief upon the ground of mistake, must show that he has used due diligence and good faith to avoid the consequences of the mistake. He cannot obtain relief, where his delay and omission of duty have caused irreparable mischief to the other party.

(Argued September 20, 1871; decided, January term, 1872.)

APPEALS from orders of the General Term of the Supreme Court, in the seventh judicial district, reversing judgments in favor of plaintiffs entered upon reports of a referee.

The actions were brought to foreclose certain bonds and mortgages executed by defendants to Jonathan Wadhams, and by him assigned to the respective plaintiffs above named. On the 4th day of January, 1854, defendant Bartow entered into a contract with Edwin Wadhams, by which he agreed to purchase of Wadhams, and the latter agreed "to cause to be conveyed to him," several parcels of land, known as lot No.

## Statement of case.

14, in section 10, and lots in 4, 5, 6 and 7, in section 12, all in Union, Monroe county, and containing in all some 668 acres, at forty dollars per acre. At the time of making this agreement, it was understood by the parties to it that the title to only one of these lots was in Edwin Wadhams; afterward, and on the tenth day of the same month (January, 1854), as Bartow himself testified, "in consummation" of this contract, he received from Edwin Wadhams and wife a deed for lot No. 6, and from Jonathan Wadhams a deed for lots Nos. 14 and 4, and from Charles Collins a deed for lot No. 5, and from Jonathan and Edwin Wadhams an assignment of a contract "and the lands thereby conveyed," made between them and one John McPhierion, and for lot No. 7, upon which there was unpaid to McPhierion \$2,500, and one year's interest thereon, which, when paid, McPhierion was, by the contract between him and the Messrs. Wadhams, by a sufficient deed to grant and convey in fee simple to them or to such person or persons as they should appoint; and as a part of the transactions of that day, in what Bartow characterized as a consummation of the contract on his part, he paid Wadhams \$7,200—assumed to pay \$9,391.10, incumbrances upon the premises, including the \$2,500 and one year's interest, making in all \$2,675 unpaid to McPhierion on lot No. 7; and to secure the balance of the purchase prices of the whole premises, \$10,147, including something over \$2,500, parcel of this contract price of lot No. 7, he gave the mortgages in suit (each reciting that it was given in consideration of the purchase-money); a fourth mortgage to one Collins for \$2,100, since paid; and that he, thereupon, entered into possession of the whole premises. It also appeared that all the title McPhierion had to lot No. 7 rested in a contract assigned to him by one Atchison, who had contracted with Bayard, the true owner, for the purchase of the same. McPhierion died in April, 1857, insolvent; after which, and in May of that year, Bayard conveyed lot No. 7, with the Atchison contract, to one Lathrop, who, in June of the same year (1857), commenced a suit for the foreclosure of the Atchison contract, upon which



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Statement of case.

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there was unpaid and then due \$2,086.44, making Atchison, the heirs and representatives of McPhier-son, and the defendant Bartow, parties defendants. Bartow gave no notice to either of the Messrs. Wadhams of the pendency of the suit, and permitted a judgment of foreclosure to be taken by default, under which that lot was sold to satisfy the amount unpaid and due upon it and costs, and purchased by one Anderson. And as a defence it was, among other things, insisted that, inasmuch as the mortgages in suit were given to secure the purchase-money agreed to be paid for all of the several parcels of land embraced in the contract of January 4, 1854, including something more than \$2,500, parcel of the purchase-price of lot No. 7, the title to which had failed and McPhier-son had died insolvent; and that, inasmuch as the balance unpaid on said mortgages was less than the loss sustained by the failure of the title to that lot, the complaint should be dismissed with costs. The referee found, among other things, as a fact in the case, that at the time of the foreclosure of the Atchison contract there was not so much unpaid upon it as was due from Bartow upon the several mortgages given by him for the purchase-price of the whole premises. And as a conclusion of law he found that the plaintiff was entitled to judgment for the amount claimed to be due upon each mortgage, and ordered judgment of foreclosure upon each mortgage for the amount claimed to be due upon them respectively, which was entered accordingly.

*Francis Kernan* for appellant. There is no implied warranty of title in the assignment, as it is an executed, not an executory contract. (*Houghtaling v. Lewis*, 10 Johns., 297; *Bull v. Willard*, 9 Barb., 641; *Ware v. Westfall*, 21 id., 177; *Carr v. Roach*, 2 Duer, 20; 3 R. S., 5th ed., p. 29, § 160.)

*Samuel Hand* for respondent. An assignee of a mortgage takes it subject to every defence that could be made if it remained in the hands of the mortgagee. (*Bush v. Lathrop*,

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Opinion of the Commission, per GRAY, C.

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22 N. Y., 532; *Cowdry v. Coit*, Com. of App., June term, 1871.) The assignment of the McPhier-son contract contained an implied warranty of title. (*Purvis v. Rayer*, 9 Price, 488; *Sauter v. Drake*, 5 Barn. & Adol., 992; *Doe v. Stanton*, 1 Mees. & Wels., 695; Sug. on Vendors, chap. 1, § 3, art. 17; *Burnell v. Jackson*, 5 Seld., 535.) McPhier-son's want of title was a breach of this implied covenant and a good defence. (*Talmdge v. Wallace*, 25 Wend., 107; *Johnson v. Gere*, 2 Johns. Cas., 546.) Where a party purchases and receives a quitclaim deed, supposing there is a title when in fact there is none, he can recover back or refuse to pay purchase-money on ground of mistake in fact. (*Martin v. McCormick*, 4 Seld., 331; *Gardner v. Mayor of Troy*, 26 Barb., 423; *Hitchcock v. Geddings*, 4 Price, 135.) The defendant had no rights and owed no duties under the Atchi-son contract. (*Adams v. Wadhams*, 40 Barb., 225.) It was optional with the defendant to pay on the McPhier-son contract, or seek his remedy on Wadhams' covenant, or by defence to the bonds and mortgages. (*Winslow v. McCall*, 32 Barb., 241.)

GRAY, C. The Supreme Court as well as the referee seem to have overlooked the fact that when, on the 4th day of March, 1854, the contract was made by which Wadhams agreed to cause the several lots embraced in it to be conveyed to Bartow, that Bartow knew that only one of the five lots was owned by Wadhams, and that the only title he had to lot No. 7 rested in a contract with McPhier-son, upon which there was unpaid \$2,675, which, when paid, entitled Wadhams, or such person as he might appoint, to a sufficient deed of conveyance of that lot. From the fourth to the tenth of January, some six days, the contract between Wadhams and the defendant Bartow remained executory; then, to end it, or, as the defendant states it, "in consummation" of it, he received a deed from Edwin Wadhams for one of the lots, from Collins for another, from Jonathan Wadhams for two others; and upon securing to be paid some \$2,500 of the pur-

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Opinion of the Commission, per GRAY, C.

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chase price of lot 7, and assuming to pay \$2,675, the amount which remained unpaid upon it from the Messrs. Wadhams to McPhierston, they assigned to him McPhierston's covenant, to convey to him that lot upon being paid the balance unpaid upon it, and thus, according to his own version of the transaction, an end was put to the contract of the fourth. It is sometimes a question necessary to be referred to and passed upon by a jury or referee, whether the receipt by an obligee of the covenant of a third party to do what has been agreed to be done by the obligor is intended by the parties as a substitute for and in discharge of the covenant of the original obligor; but where it is clearly understood, as in this case, that the object of the one in assigning and of the other in receiving is to put an end to the original obligation, its effect becomes the only question for consideration. The parties having terminated the contract of the fourth of January, by the defendant's receiving, in consummation of it, a deed from each of the owners of the respective lots owned by them, which, by that contract, Wadhams was to cause to be conveyed to him, and the assignment of a covenant of a third party to convey the remaining part, must look to the substituted covenant for the redress of any grievance he has sustained by reason of the failure of the title conveyed or covenanted to be conveyed to him.

It was claimed on the argument that the assignment of the McPhierston contract, containing his covenant to give a sufficient deed, implied a warranty on the part of the assignors that McPhierston had a good title and a right to convey the land. It implied a warranty that the assignors owned the contract assigned by them, and that the signatures to the contract were genuine, but not that the land embraced in it was the property of McPhierston. The assignment "of the land thereby conveyed" was at most but a quitclaim of the title of Wadhams to the land described therein; in which, by statute, no warranty of title could be implied. (3 R. S., 5th ed., 29, 30, § 160.) It was also insisted that, irrespective of any covenant, that where a purchaser supposes he has pur-

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Opinion of the Commission, per EARL, C.

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chased a good title and pays for it, and it turns out that the grantor had no title, the purchaser may recover back the purchase-money, on the ground of a mistake of fact. This he may do if both parties are mistaken, and not otherwise. (*Martin v. McCormick*, 8 N. Y., 331, 335.) Unless the mistake is mutual, if there be no ingredient of fraud, the party is remitted to his covenants. (2 Kent's Com., 11th ed., 622, marg. 473.) There is neither allegation nor proof of mutual mistake, nor of any fraud on the part of the assignors of McPhierson's covenants; and hence, without considering any other question submitted on the part of the appellant, I am of opinion that the judgment of the Supreme Court should be reversed, and that entered upon the report of the referee should be affirmed.

EARL, C. On the 4th day of January, 1854, the defendant Bartow entered into contract for the purchase, from Edwin Wadhams, of lots 4, 5, 6, 7 and 14, and, upon the payment of the purchase money, Wadhams agreed to grant and convey to Bartow, a fee simple to the lots "by a good and sufficient deed of conveyance." In this executory contract there was an implied warranty on the part of Wadhams that he had good title to the lots, and Bartow could not be compelled to take a deed in performance of it which would not give him a good and perfect title. (*Burwell v. Jackson*, 9 N. Y., 535.) But this implied warranty had force and vitality only while the contract remained executory. In such a case, after the deed has been executed and delivered by the vendor in performance of the contract, the implied covenant contained in the contract is gone, and the vendee must rely upon express covenants contained in his deed. If the vendee has taken a deed without covenants, and his title proves defective, he is without remedy, unless he can make a case for relief, upon the ground of fraud, and possibly of mistake. (*Houghtailing v. Lewis*, 10 Johns., 297; *Bull v. Willard*, 9 Barb., 641; *Ware v. Westfall*, 21 Barb., 177.)

Here Bartow received, in performance of the contract, a

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Opinion of the Commission, per EARL, C.

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deed of lot 6, from Edwin Wadhams, of lots 4 and 14 from Jonathan Wadhams, and of lot 5 from John H. Collins; and he received from Edwin and Jonathan Wadhams the McPhier-son contract for lot 7. The contract thus became executed. If the deeds given contained no express covenants, and there proved to be a defect in the title to any of the lots conveyed to him by deed, he was entirely without remedy. What different position does he hold as to lot 7? The contract for that lot was assigned to him by an instrument under seal, of which the following is a copy: "For a valuable consideration to us in hand paid by Charles Bartow, we hereby sell, assign, transfer and set over the within contract and the lands thereby conveyed to the said Charles Bartow, his heirs and assigns." If Bartow has any implied covenant upon which he can rely, it must be in this assignment. This was not an executory contract to sell the McPhier-son contract. If it had been, it may well be, in the light of the authorities, that a covenant would be implied, not only that they held the contract and had the right to sell it, but that McPhier-son had a good title to the land which by his contract he had agreed to convey. This was an executed sale and transfer of the contract and of the assignor's interest in the land, and a covenant is no more to be implied than if a quitclaim deed had been given. If we were to treat the assignment of this contract as the sale of a chattel, and apply to it the rules applicable to sales of personal property, the same result would follow. In such case there would be an implied warranty that the assignor had title to the contract and the right to assign it; but there could be no implied warranty that McPhier-son would perform the contract on his part. McPhier-son's relation to the title was such that it was possible and feasible for him to perform the contract, and Bartow, by the assignment to him, was placed in such relation to the title that he could have compelled performance. Hence, this was not a case where the assignor had nothing to assign and the assignee got nothing by the assignment.

The defendants cannot, therefore, rest their defence upon

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Opinion of the Commission, per EARL, C.

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any covenant; and we will look further to see if there is any other ground to rest it upon. It cannot rest upon the ground of a total failure of consideration, because it must be conceded that Bartow got by the assignment possession of the lot and a valuable interest therein, which, as we have above intimated, could have ripened into a perfect title. It cannot rest upon the ground of mistake, even if the answer, proof and findings were otherwise adequate to such a defence, because it was in such case the duty of Bartow, as soon as he discovered the mistake, to offer to rescind, or at least to notify Wadhams of it. He was informed of the alleged mistake at least as soon as the foreclosure suit was commenced against him and others by Lathrop. And yet he took no measures in that suit, as he might have done, to secure his title, as there was more due from him to McPhiereson which he had assumed to pay than there was due to Lathrop; and he gave no notice to his assignors that they might protect his title. He waited until the entire interest under the McPhiereson contract had been wiped out, and then for the first time made his claim on the ground of the alleged mistake. He was too dilatory, and his claim came too late. In ordinary cases of tort and breach of contract, it is a fair and just rule which requires the injured party to use ordinary diligence to make his damages as small as he can, and confines his recovery to so much damages only as he could not by good faith and ordinary diligence have averted. Much more where a party comes into equity seeking relief on the ground of mistake should he show that he has used due diligence and good faith to avert the consequences of the mistake; and it would be a poor administration of equity that would give him relief after, by his delay and omission of duty, he had caused irreparable mischief to the other party.

I am, therefore, upon the whole case, in favor of reversing the order of the General Term, and affirming the judgment entered upon the report of the referee, with costs.

All concur, except HUNT, C., not sitting.

Order reversed.

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Statement of case.

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SARAH M. HOFFMAN, Respondent, v. ABNER A. ARMSTRONG,  
Appellant.

A person upon whose lands a tree wholly stands is the owner of the whole thereof, and is entitled to all its fruit, notwithstanding some of its branches overhang the lands of another.

(Argued September 21st, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the seventh judicial district, affirming a judgment for the plaintiff entered on a verdict. The action is for assault and battery. (Reported below, 46 Barb., 337.)

The facts are these: Dr. Hoffinan and the defendant were the owners of adjoining lands, separated by a line fence. There was a cherry tree standing upon the land of Dr. Hoffinan with limbs overhanging the land of the defendant. The plaintiff, who was a sister of Dr. Hoffinan, and lived with him, went upon the line fence and undertook to pick cherries from a limb of the tree which overhung the defendant's land. He forbid her, and on her still persisting, the defendant attempted to prevent her by force and did her a personal injury.

The court held, and so charged the jury, that "every person upon whose lands a tree stands owns the whole of that tree, notwithstanding portions of it may overhang the lands of another; and in this case, as it is conceded that the body or trunk of the tree was wholly upon the land of Dr. Hoffinan, he was entitled to all the fruit growing thereon, and hence, if the defendant attempted to prevent the plaintiff from picking such fruit by violence he was a wrong-doer, and this action lies against him. If he touched her at all, with the intention of preventing her from picking the cherries while she was standing on the premises or fence of Dr. Hoffinan, although they were upon the limbs overhanging his yard, then this action lies against him, and your verdict should be for the plaintiff."

The defendant excepted to the several legal propositions  
SICKELS--VOL. III. 26

Opinion of the Commission, per Lorr, Ch. C.

contained in the charge, and requested the judge substantially to charge that the limbs of the tree overhanging the land of the defendant belonged to him, that he was entitled to the fruit thereon, and that he had the right to prevent the plaintiff from picking it by the application of all necessary force, if she refused to desist after being requested to do so. This was refused and exceptions were taken to such refusals.

*Amasa J. Parker* for the appellant. The defendant was the owner of the fruit which was growing on the branches of the tree, and which overhung his land. He owned everything above as well as everything below his land. (2 Bl., 18; 3 Kent's Com., 401, § 52; Broom's Legal Maxims, 289, 292, 382, ed. 68; *Norris v. Baker*, 1 Rol. Rep., 393; *Lodie v. Arnold*, 2 Salk., 458; 3 Stephens Com., 500; *Holden v. Coats*, 1 Moody & Malkin, 112; *Waterman v. Toper*, 1 Ld. Raym., 737; *Griffin v. Bisby*, 12 N. H., 454; *Lyman v. Hale*, 11 Conn., 177; *Masters v. Pollie*, 2 Rol. R., 141; Crabbe on Real Property, § 96; 2 Bouvier's Inst., 158, 1570, 1576). Being such owner he was authorized to protect it. (38 Vt., 117.)

*H. V. Howland* for the respondent. The cherry tree with its fruit was the property of Dr. Hoffman. Plaintiff was not a trespasser, therefore. (34 Barb. R., 547; *Masters v. Pollie*, 2 Rol. Rep., 141, 255; *Toper v. Waterman*, 1 Lord Raym., 737; 1 Moodie & Malkin, 112; 7 vol Kinne's Law Comp., 252; 12 N. H., 457; 11 Conn. R., 177; 1 Hilliard on Real Property, 10; 9 Barb. R., 655; 25 N. Y. R., 123.)

Lorr, Ch. C. The only material question presented in this case is, whether the owner of land overhung by the branches of a fruit tree standing wholly on the land of an adjoining owner is entitled to the fruit growing thereon.

The defendant claims that the ownership of land includes everything above the surface, and bases his claim on the maxim of the law "*Cujus est solum ejus est usque ad cælum*,"



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Opinion of the Commission, per LOTT, Ch. C.

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and that consequently he was the owner of the overhanging branches and the fruit thereon. The general rule unquestionably is, that land hath in its legal signification an indefinite extent upward, including everything terrestrial, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature as trees, herbage and water, or by the hands of man as houses and other buildings. (See Co. Litt., 4a; 2 Black. Com., 18; 3 Kent's Com., p. 401; 2 Bouvier's Ins. § 1570).

This rule, while it entitles the owner of the land to the right to it, and to the exclusive use and enjoyment of all the space above it, and to erect any superstructure thereon that he may see fit—and no one can lawfully obstruct it to his prejudice—yet if an adjoining owner should build his house so as to overhang it, such an encroachment would not give the owner of the land the legal title to the part so overhanging. It would be a violation of his right, for which the law would afford an adequate remedy, but would not give him an ownership or right to the possession thereof. (See *Aiken v. Bensedict*, 39 Barb., 400.)

Although different opinions have been held as to the rights of owners of adjoining land in trees planted, the bodies of which are wholly upon that of one, while the roots extend and grow into that of the other and derive nourishment therefrom, it was considered by ALLEN, J., in giving the opinion of the court in *Dubois v. Beaver* (25 N. Y. Rep., 123, etc.), that the tree is wholly the property of him upon whose land the trunk stands. This principle is sustained in *Masters v. Pollie* (2 Rol. Rep., 141), *Holder v. Coates* (1 Moody & Malkin, 112), 22 E. C. L. R., 264.

The ground or reason assigned in those cases for holding that the owner of land on which no part of a tree stands, but into which the roots extend, has any interest, is that the tree derives its nourishment from both estates, and not the ground or maxim on which the defendant's claim is based.

We have not been referred to any case showing that where no part of a tree stood on the land of a party, and it did not

## Statement of case.

receive any nourishment therefrom, that he had any right therein, and it is laid down in Bouvier's Institutes (section 1573) that if the branches of a tree only overshadow the adjoining land, and the roots do not enter into it, the tree wholly belongs to the estate where the roots grow. (See also *Masters v. Pollie*, 2 Rol. Rep., 141; *Waterman v. Toper*, 1 S. Ld. Raymond, 737.)

The rule or maxim giving the right of ownership to everything above the surface to the owner of the soil has full effect without extending it to anything entirely disconnected with or detached from the soil itself.

It follows, from the views above expressed, that the ruling of the judge at the Circuit was right, and the judgment appealed from must be affirmed, with costs.

All concur.

Judgment affirmed.

48	204
116	96
48	204
148	380
48	204
151	102
48	204
j170	297

CORNELIUS RYAN, Respondent, v. RICHMOND WARD et al.,  
Appellants.

Where upon payment of a portion of an undisputed account, the creditor gives a receipt in full, he is not concluded thereby from recovering the balance, although the receipt was given with knowledge, and there was no error, or fraud.

(Argued May 22, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial district, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This is an action to recover a balance due on a contract for the delivery of hides. The hides were delivered at various dates, from February, 1863, until the latter part of August in the same year. Payments were made to the plaintiff's agent weekly, and receipts given by him. Fifteen of these receipts, between May and February, were expressed to be *in full*. The referee found the agreement to be as alleged by the plain-

## Statement of case.

tiff, and that there was a balance due to him, which consisted of the bonus paid by him to butchers on the purchase of hides. This bonus, it is found, was agreed to be paid to the plaintiff, by the defendant's authorized agent, and it accrued from time to time during the whole period of delivery, from February to August.

The referee reported, in favor of the plaintiff, the judgment upon his report was affirmed by the General Term, and the defendants appeal to the Court of Appeals.

*Samuel Hand* for the appellants. A receipt in full, given with full knowledge of all the circumstances and in the absence of fraud, is conclusive. (Starkie on Evidence, vol. 3, 1276; Phillips on Evidence, 4th Am. ed., vol. 3, 653; *Benson v. Bennett*, 1 Campb., 394; *Emrie v. Gilbert*, 1 Wright R., 764; *Holbrooke v. Blodget*, 5 Verm. R., 520; *Sessions v. Gilbert*, Brayt. R., 291; *Giddings v. Munson*, 4 Verm. R., 308; *Patterson v. Ackerson*, Edw. Ch. R., 427.)

*John M. Scribner, Jr.*, for the respondent. As to the terms of the contract and the question of fraud, these were questions of fact for a referee and not the subject of review in this court. (*Cady v. Allen*, 18 N. Y., 573; *Hoyt v. Thompson*, 19 N. Y., 207; *Marshall v. Smith*, 20 N. Y., 251; *Bergen v. Wemple*, 30 N. Y., 319; *Ostrander v. Fellows*, 39 N. Y., 350; *Wiltrie v. Eaddie*, 4 Abb. [N. S.], 393.) The legal right to the bonus once existing, could only be extinguished by payment or release. (*Williams v. Carrington*, 1 Hilt., 515; *Seymour v. Minturn*, 17 J. R., 169; *Acker v. Phoenix*, 4 Paige, 305; *McKnight v. Dunlop*, 1 Seld. [5 N. Y.], 537.) A receipt in full of a sum less than the amount due, in no way discharges the right to recover the balance. (*Hendrickson v. Beers*, 6 Bosw., 639; *Thomas v. M' Daniel*, 14 J. R., 185; *Rourke v. Story*, 4 E. D. Smith, 57; *McDougal v. Cooper*, 31 N. Y., 498; *Colburn v. Lansing*, 46 Barb., 37.)

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Opinion of the Commission, per HUNT, C.

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HUNT, C. The facts are all found in favor of the plaintiff. They are sustained by competent evidence, and the judgment has been affirmed by the General Term. We can make no inquiry into the facts, but must take them as given by the referee in his report.

There is but a single question of law in the case. During the delivery of the hides payments for them were usually made weekly. On several of these occasions receipts were given for the precise amounts paid, which were expressed to be in full for the hides. In fact, the payment was not in full, but a further sum was then due. This was known to the plaintiff. There was no error, and there was no fraud. Is the plaintiff cut off by these receipts from now recovering the balance actually due to him?

By the finding of the referee this amount now sought to be recovered was, and is, actually due to the plaintiff. How has the debt been discharged? Not by payment; not in a settlement, by way of compromise, of disputed accounts. No such transaction took place. There was no dispute between the parties. Neither was asked at any time to yield anything claimed on his part. Neither party understood that there was any such concession. There was due to the plaintiff a sum, certain—say \$2,000, as an illustration. The defendants pay \$1,500 and the plaintiff gives them a receipt in full for \$2,000. If A. lends B. \$2,000, and B. pays A. \$1,500, which A. says, either orally or by writing, is in full of the loan, it, nevertheless, is not in full. A. may at once sue B. and recover the remaining \$500. There is no consideration for the professed discharge. A man cannot, by the payment of \$1,500, pay an admitted debt of \$2,000. This has ever been the law. In such case nothing less than a technical release, under seal, can bar the recovery. (*Harrison v. Close*, 2 J. R., 448; *Seymour v. Minturn*, 17 id., 169; *Mech. Bk. v. Hazard*, 13 id., 353.)

I can see no difference, in this respect, between an admitted debt created by the sale of property and an admitted debt created upon the loan of money. They stand upon the

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Opinion of the Commission, per EARL, C.

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same plane. Neither can be satisfied by part payment. (*Hendrickson v. Beens*, 6 Bos., 639; 1 Greenl. Ev., §212; auth. *supra*.)

The cases in which a receipt has been held to be conclusive upon the party giving it will be found to be cases where the claims or accounts were in dispute, and a compromise was agreed upon; or where a receipt was given for unliquidated damages. Such were the cases of *Coon v. Knapps* (4 Seld., 402), and *Kellogg v. Richards* (14 Wend., 116), cited by the appellant. The first case was where an injury was sustained by the upsetting of a stage-coach. The plaintiff gave a receipt for forty dollars "in full for damages done to me by the stage accident of the 13th of June." This was held to be in the nature of a contract and release, and that it could not be varied by parol proof. It has no resemblance to the case before us. *Kellogg v. Richards* was a case where the creditor received the note of a third person for a less sum than that due to him, and in full payment of his debt. In such case the security of a third person forms a consideration for the discharge of the residue of the debt. It is binding as an accord and satisfaction. (*Boyd v. Hitchcock*, 20 Johns., 76; *Le Page v. McCrea*, 1 Wend., 164.)

In my opinion the judgment of the General Term was correct and should be affirmed.

EARL, C. Whether or not the contract in reference to the hides was as claimed by the plaintiff in his complaint, was a question of fact finally disposed of by the report of the referee in plaintiff's favor.

The only question, then, for us to consider, is, whether the various receipts in full were so far conclusive upon the plaintiff, that he could not show by parol that the items for "extra bonus" paid by him to the butchers were, nevertheless his due.

It has long been settled in this State, that a receipt furnishes mere *prima facie* evidence of the facts stated therein, and that it may be controverted or explained by parol evi-

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Opinion of the Commission, per EARL, C.

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dence. (*Tobey v. Barber*, 5 Johns., 68; *Kellogg v. Richards*, 14 Wend., 116; *Coon v. Knapp*, 4 Seld., 402; *McDougall v. Cooper*, 31 N. Y., 498; *Filkins v. Whyland*, 24 id., 338; *Buswell v. Poiner*, 37 id., 312; *McDaniels v. Lapham*, 21 Vermont, 222, 232.) This grows out of the fact that a receipt is not a contract. It is a mere declaration or admission in writing. Where a contract is embodied in the receipt, then, so far as the receipt contains a contract, it cannot be controverted or explained by parol.

It has never been intimated, in any case in this State, that it made any difference whether the receipt was for a specified sum of money or in full. The same rule applies, and no reason is apparent why it should not. A receipt for a specified sum of money contains a declaration that so much has been paid upon account, or for a particular purpose. A receipt in full contains a declaration that a certain sum has been paid in full of all claims of a certain kind, or of all demands. Neither kind of receipt embodies any contract. Both furnish only *prima facie* evidence, and are valuable only as such. Both are equally open to explanation or contradiction.

Hence, in this case, there was no error in permitting the plaintiff to show that the receipts in full were given only to cover the price of the hides and the commission of one-half per cent, and that they did not cover, and were not intended to cover, the "extra bonus" claimed in this action.

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

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Statement of case.

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NICHOLAS SWARTHOUT, Respondent, v. THE NEW JERSEY STEAMBOAT COMPANY, Appellant.

The acts of Congress providing for the better security of the lives of passengers on board of vessels propelled by steam, etc. (act of July 7, 1838, amended by act of August 30, 1853), do not take away or impair the common-law right of action by a person injured, while a passenger upon such a vessel.

An inspection of the boilers by the proper United States inspector, as prescribed by said act, and a certificate of inspection that in his opinion the vessel, her boiler and machinery, came up to the requirements of the act, is not conclusive, and does not exonerate the owner from liability.

(Argued September 22, 1871 ; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial district, affirming a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial. (Reported below, 46 Bar., 222.)

This action, brought to recover damages sustained by the plaintiff while a passenger on the defendant's steam vessel, Isaac Newton, from New York to Albany, was tried at the Rensselaer Circuit, in May, 1865. On the trial it appeared that in December, 1863, while the plaintiff was such passenger, an explosion of one of the boilers of the vessel occurred, and that the plaintiff was thereby greatly injured. On the part of the plaintiff it was proved that the escape of steam, causing the injury, was the result of an improper construction or fastening of the part of the boiler which gave way ; that there had been for years a more improved mode of constructing the boiler, which, if it had been adopted by the defendant, no injury would have occurred. On the part of the defendant it was proved that on or about the twenty-fourth day of March, 1863, the boilers upon that vessel were, in compliance with the requirements of the acts of Congress for that purpose, duly inspected by the proper United States inspector, from which it was ascertained that the vessel was built in 1846 ; that

the boilers in use, when the explosion occurred, were constructed in 1856; that each boiler was subjected to a hydrostatic pressure of forty-four pounds to the square inch; in short, that by the inspection, the vessel, her boilers, safety-valves, supply pipes, steam pipes, etc., in the opinion of the inspector, came up to the requirements of the law, and that at the time of the explosion the pressure was less than thirty pounds to the square inch. When the evidence closed, the defendant's counsel moved that the plaintiff be nonsuited. The only ground of the motion, appearing in the bill of exceptions, was that the defendant having shown a perfect compliance with the acts of Congress, was not liable in this action. The motion was overruled and the defendant excepted. The judge, in submitting the evidence upon the issues to the jury, instructed them that the plaintiff was entitled to recover for his bodily sufferings such an amount as in their judgment he was entitled to receive, to which also the defendant excepted. The jury rendered a verdict in favor of the plaintiff for \$2,000. A motion was made at Special Term for a new trial, and denied, and judgment being entered upon the verdict, the defendant appealed therefrom to the General Term, where the judgment was affirmed, and the defendant appealed again to the Court of Appeals.

*Charles Jones* for appellant.

*M. I. Townsend* for respondent. The granting of a new remedy by statute does not deprive a party of one then existing, unless it is expressly so provided. (*Renwick v. Morris*, 7 Hill, 575; 2 Coke Inst., 200.)

GRAY, C. Two questions are presented by the bill of exceptions for our consideration. One is, whether an inspection of the vessel, upon which the injury complained of occurred, her boilers, including her entire steaming apparatus, by the proper officer for that purpose, showing, as the inspector believed and certified, that they came fully up to



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Opinion of the Commission, per GRAY, C.

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the requirements of the act of Congress of July 7, 1838, and the act amendatory of the same, passed August 30, 1852, constituted of itself a defence to this action. The only object of legislation by Congress on this subject was to secure to the passengers upon steam vessels greater security against disaster.

The testimony of the inspector, whether as a witness upon the stand or by his official certificate, is not made conclusive; evidence upon the same subject, borne by persons of equal character and skill, is to be taken and considered upon its merits. Congress has not professed to take away or impair the common law right of action by persons thus injured through the unskillfulness or negligence of the owner or master of a vessel. The act itself provides, that if the injury happens not only through any neglect to comply with its provisions, but through known defects of the steaming apparatus, the master and owner, as well as the vessel itself, shall be liable. It was fairly inferable from the evidence that injury occurred through a known defect of the steaming apparatus. It was proven by witnesses on the part of the plaintiff that the escape of the steam was caused by an improper construction or fastening of the part of the boiler that gave way, and that a better and more improved mode of constructing the boiler had been in use for years, which, if it had been adopted, would have saved the injury. The only other question arises upon the instruction given to the jury, that the plaintiff was entitled to recover what, in their judgment, he should receive for his bodily sufferings. In this there was no error; the ruling rests upon authority. (*Ransom v. The N. Y. and E. R. R. Co.*, 15 N. Y. R., 415; *Curtis v. The Rochester and Syracuse R. R. Co.*, 18 N. Y. R., 541.) The judgment should be affirmed.

All concur.

Judgment affirmed.

## Statement of case.

DOROTHEA RAWSON, Respondent, vs. THE PENNSYLVANIA  
RAILROAD COMPANY, Appellant.

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Under the provisions of the act of 1860, concerning the rights and liabilities of husband and wife (Laws of 1860, chap. 40), as amended in 1863 (Laws of 1863, chap. 172), the paraphernalia of a wife, given her by her husband, which prior to those statutes was her separate estate in equity, became clothed with all the incidents of a legal estate; and, for an injury to or conversion thereof, she is the proper person to bring suit.

The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice, printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried.

If, however, the passenger's attention is called to it when purchasing his ticket, or if he knew of it when he purchased, the law will presume, in the absence of any objection upon his part, that he assented to the terms. The contract is made, and rights and duties of the parties are determined, when the ticket is purchased. A discovery by the passenger of the notice after he has entered upon his journey does not affect his rights.

(Argued September 23, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment entered upon a verdict in favor of plaintiff.

The action was brought to recover the alleged value of two trunks containing clothing and jewelry to the amount of \$3,847, and lost on the railroad of the defendants in September, 1864.

The plaintiff was returning from Massillon, Ohio, to New York, and bought at Massillon a through ticket to New York, which contained the following notice on its face:

"This ticket entitles the holder to not over 80 lbs. baggage free, and not at rate exceeding in value 100 dollars, unless notice is given, and an extra amount paid, at double first-class freight rates. No road represented by either of these tickets is responsible for the passenger or baggage while upon any other road.

(Signed)

"H. R. PAYSON,  
"General Passenger Agent."

## Statement of case.

The trunks were then checked at Massillon to Pittsburgh as baggage; at Pittsburgh they were checked to New York. Nothing was paid for extra baggage.

Near Thomaston, on the Pennsylvania railroad, and between the points from and to which the trunks were to be conveyed on said road, an accident occurred, and the trunks were burned or destroyed.

The greater part of the property was received by the plaintiff from her husband; she received, however, over \$1,000 worth of it from her son.

The jury returned a verdict for the full value of the property destroyed.

*A. J. Vanderpoel* for appellant. A common carrier may, by contract, qualify, restrict or limit his liability. (*Macrow v. Great Western R. R.*, Law Reports, 6 Q. B., 618; *P. & O. St. Nav. Co. v. Shaw*, 11 Jurist, N. S., 771, Privy Council; GRAY, J., 245, in *Squire v. N. Y. Cent. R. R.*, 98 Mass., 239; *Wells v. N. Y. Cent. R. R. Co.*, 24 N. Y., 183; *Perkins v. N. Y. Cent. R. R. Co.*, 24 N. Y., 196; *Russell v. N. Y. Cent. R. R. Co.*, 25 N. Y., 442; *Merrill v. Grinnell*, 30 N. Y., 594; *Price v. Hartshorne*, 44 Barb., 666; *De Rute v. N. Y., etc., Tel. Co.*, 30 How. Pr. R., 404; *Weed v. Saratoga & S. R. R. Co.*, 19 Wend., 534; *Wolf v. Western Union Tel.*, 62 Penn. St., 83; Story on Bailments, §§ 549 and 554 and note.) The ticket in this case contained a contract between the parties. (*Stewart v. L. & N. W. R.*, 10 Jurist [N. S.], 806; *Grace v. Adams*, 10 Mass., 131.) The article of baggage not paid for was transported at risk of plaintiff, and she must prove loss was caused by the willful act of defendant. (Edwards on Bailment, §§ 47, 436, 568-9; *Wells v. N. Y. Cent. R. R. Co.*, 24 N. Y., 183; *Field v. N. Y. Cent. R. R. Co.*, 32 N. Y., 339, 350.) All baggage beyond a reasonable amount, or beyond what is necessary, of which the carrier is not aware, and for the conveyance of which he receives nothing, is at the risk of the passenger, and the carrier is not liable. (*Orange County Bank v. Brown*,

## Statement of case.

9 Wend., 85; *Pardee v. Drew*, 25 Wend., 459; *Van Wyck v. Howard*, 12 How. Pr., 148; *Fowler v. Dorlan*, 24 Barb., 384; *Richards v. Westcott*, 3 Bosw., 589; *Gibbon & Paynton*, 4 Burr, 2798; *Batson v. Donovan*, 4 Barn. & Ald., 21; 6 E. C. L., 331; *North R. W. Co. v. Shepherd*, 14 E. L. & E., 367; 2 Kent Com., 603; *Wilkins v. Earle*, 19 Abb. Pr., 190; Angel on Carriers, § 279; *Hawkins v. Hoffman*, 6 Hill, 586; *Grant v. Newton*, 1 E. D. Smith, 9; *Nordmeyer v. Loescher*, 1 Hilt., 499; *Glasco v. N. Y. Cent. R. R.*, 36 Barb., 557; *Merrill v. Grinnell*, 30 N. Y., 594.) At common law the paraphernalia of the wife belongs to and may be disposed of by the husband. (2 Kent. Com., 143; *Williams on P. E.*, 293.) As the contract was made in Pennsylvania, this incapacity is presumed to prevail there, and will prevent recovery. (Story's Con. of Laws, ch. 4, § 103, ch. 8, § 280.) Plaintiff, under our statutes, could not take by gift from her husband. (Act of 1849, 3 R. S., 240, § 77; Laws of N. Y., 1860, ch. 90, p. 157, § 1; Laws of 1812, ch. 172, p. 143, §§ 7, 8; *Glasco v. N. Y. Cent. R. R. Co.*, 36 Barb., 557.)

*D. M. Porter* for respondent. The property was plaintiff's separate property, and she could maintain action. (Laws of 1862, p. 363; *Wallingford v. Allen*, 10 Peters, U. S. S. C. R., 594.) The law of Pennsylvania, in the absence of allegation and proof, is presumed to be the same as our own. (*Walker v. Maxwell*, 1 Mass., 103; *Collett v. Kirth*, 2 East, 261; *Monroe v. Douglass*, 1 Selden, 447.) The action is upon an express contract, therefore the husband could not have recovered. (*Weed v. Saratoga R. R. Co.*, 19 Wend., 534.) If defendant was guilty of gross negligence, it was liable, even if notice prevented recovery, for ordinary neglect. (*Brook v. Pickwick*, 4 Bing., 218, 404; *Wells v. S. N. Co.*, 4 Seld., 375; 24 N. Y., 232.) Plaintiff was entitled to carry articles for her instruction, pleasure, convenience or amusement. (*Dexter v. Syracuse, B. & N. Y. R. R. Co.*, 42 N. Y., 326; *Merrill v. Grinnell*,

## Opinion of the Commission, per EARL, C.

30 N. Y., 594; *Hawkins v. Hoffman*, 6 Hill, 586, 590; *Davis v. Cayuga, etc., R. R. Co.*, 10 How. Pr., 330; *Van Horn v. Kermit*, 4 E. D. Smith, 453; 1 id., 100; *Cole v. Goodwin*, 19 Wend., 251.) A ticket is not a contract, but merely evidence that the passenger has paid his fare. (*Quimby v. Vanderbilt*, 17 N. Y., 306; *Nevins v. Bay State Steamboat Co.*, 4 Bosw., 234.) A common carrier cannot limit his liability by notice, even if it be brought to the knowledge of the owner. (*Dorr v. The New Jersey Steam Navigation Co.*, 1 Kern., 485; *Hollister v. Nowlen*, 19 Wend., 234; *Cole v. Goodwin*, id., 251; *Camden Co. v. Belknap*, 21 Wend., 354; *Clark v. Faaton*, id., 153; *Alexander v. Greene*, 3 Hill, 9; 7 id., 533; *Powell v. Myers*, 26 Wend., 594; *Bissels v. N. Y. C. R. R.*, 25 N. Y., 442, 445; *Nevins v. B. S. Steamboat Co.*, 4 Bosw., 234.)

EARL, C. The first question to be considered is, whether the property destroyed belonged to the plaintiff in such a sense that she can maintain this action. It consisted of her wearing apparel and personal ornaments, and constituted her paraphernalia. A portion of them was given to her by her husband, and as to such portion it is claimed she had no such property as will sustain a recovery in her name. At common law the wife's paraphernalia during coverture ordinarily belonged to the husband, and he could dispose of them; but he could not dispose of them by will; and if the wife survived him, she could claim them against all persons, except the husband's creditors. And this common-law rule is substantially embodied in our statutes, except that the wife's paraphernalia are secured to her even as against creditors. (2 R. S., 84, §§ 9 and 10; 1 Williams on Executors, 644; Willard's Executors, 251; Reeves' Domestic Relations, 37.)

For an injury to or conversion of the wife's paraphernalia during coverture, the husband was, at common law, the proper party to sue, and this rule has not been changed by our statutes, except so far as the wife can, in any case, claim the paraphernalia as her separate property.

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Opinion of the Commission, per EARL, C.

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This property was given to the wife by her husband and her son. As to so much as was given to her by her son, no question is made; but it is claimed that the gift from her husband to her was invalid, and hence that the property remained his. Prior to the recent legislation in this State in reference to the rights of married women, gifts of personal property from husband to wife would be upheld in equity, though void at common law, and such gifts could be impeached only by creditors. (*Graham v. Londonderry*, 3 Atk., 393; *Deming v. Williams*, 26 Conn., 226; *Borst v. Spelman*, 4 N. Y., 284; *Neufville v. Thomson*, 3 Edw. Ch., 92; *Mews v. Mews*, 21 Eng. L. and Eq., 556; Reeves' Dom. Rel., 3d ed., 170, note 1.) In equity the property given would be treated as the wife's separate estate, and she would be protected in its enjoyment and possession, even against the interference of her husband. This estate, under the statutes of 1848, 1849, 1860 and 1862, in reference to the property of married women, if not absolutely converted into a legal estate, is clothed with all the incidents of a legal estate, and she is the proper person to sue and to be sued in reference thereto. Hence I cannot doubt that this action was properly brought in the name of the plaintiff.

The only other question to be considered is, whether the matter printed upon the face of the railroad ticket, bought by the plaintiff at Massillon, limited the liability of the defendant; and that it did not, is now too well settled to admit of dispute. (*Blossom v. Dodd*, 43 N. Y., 264.) The words thus printed do not purport to embody the contract between the parties. They are a mere notice as to the terms upon which a passenger's baggage will be carried, and are entitled to no more force because they are printed upon the face of the ticket than if they had been printed on the back of the ticket, or on a separate piece of paper posted up at the ticket office; and hence this case is clearly within the rule that a carrier cannot limit his liability by notice, but can do so only by express contract.

It must, however, be admitted that if the railroad agent had called plaintiff's attention to this language, when he sold the

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Opinion of the Commission, per EARL, C.

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ticket and took her money, or if it had been shown that she knew of this language when she paid her money and took the ticket, the law would presume, in the absence of objection on her part, that she assented to the terms therein expressed. But here she testified that she did not read this language, and there is no proof that she received the ticket under such circumstances that the law will presume that she must have known and understood the language, and assented to the terms. It would be unreasonable to presume that a passenger, when he buys a railroad ticket at a ticket office, stops to read the language printed upon it, and it would be equally unreasonable to hold that a passenger must take notice that the language upon his ticket contains any contract, or in any way limits the carrier's common-law liability.

A ticket does not generally contain any contract, and is not intended to. It is a mere token or voucher adopted for convenience to show that the passenger has paid his fare from one place to another.

The contract between these parties was made when the plaintiff bought her ticket, and the rights and duties of the parties were then determined. Hence, even if the plaintiff had read what appears upon her ticket after she had entered upon her journey, it would have made no difference with her rights. She was not then obliged to submit to a contract which she never made, or leave the train and demand her baggage.

I have, therefore, reached the conclusion that the judgment should be affirmed with costs.

All concur; LEONARD, C., not sitting.

Judgment affirmed.

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Statement of case.

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GEORGE W. EVERETT, Respondent, v. PHEBE EVERETT,  
Appellant.

When one purchases land, and at his request the same is deeded to another, although the purchaser receives and retains the deed, without disclosing the existence thereof to the grantee, and takes and retains possession of the land, yet by the deed the title passes and becomes vested in the grantee, and under the prohibitions of the statute of uses and trusts (1 R. S., 728, § 51) no trust results in favor of the purchaser.

(Argued September 22d, 1871; decided January term, 1872.)

APPEAL from order of the General Term of the Supreme Court in the second judicial district, reversing an order denying a new trial and setting aside a verdict in favor of defendant, and granting a new trial.

This is an action of ejectment to recover two pieces of land in the town of Middletown, Orange county. As to the first one, termed the Armstrong lot, no questions are here presented. The controversy arises upon the lot called the Vail lot. This lot was the property of one Lewis Vail, who in the early part of the year 1838 made a bargain with Walter Everett, to sell him a larger lot, of which this was a part. On the first of April, 1838, Everett received a deed of a portion of the premises, and by his request Mr. Vail made a deed of another portion thereof, being that now in dispute, to Walter Collins Everett, a son of the said Walter. This deed was taken by the father and retained in his possession for some time. There was conflicting testimony on the question whether the deed was ever delivered to Collins. Collins died in January, 1842, having previously made a will, in which he gave all his real estate to his father for life, and authorized its sale by his executor after his father's death. The father died in July, 1848, after which the premises were sold, and in June, 1864, they were conveyed by the executor of Collins to the plaintiff. The plaintiff claims that by the pro-



## Statement of case.

ceedings in 1838 the title to the lot became vested in Collins, and bases his title upon such ownership.

The deed from Vail to Collins Everett was never put on record; and after the death of Collins, in 1842, his father destroyed the deed and obtained another deed from Vail to Lewis Hudson Everett. Hudson Everett, in 1845, conveyed the premises to Walter Everett, who died in July, 1848. He left a will by which he devised these premises to his widow, Phebe Everett, the present defendant, during her life. The plaintiff demanded the possession from the defendant, and upon her refusal commenced the present action. The judgment was for the defendant at the Circuit. The further facts necessary to be understood are stated in the opinion.

*Amasa J. Parker* for the appellant. The order of General Term does not state that a new trial was ordered on the facts. Therefore the reversal must be deemed to be on the law only. (*Borst v. Spelman*, 4 N. Y., 284; *Weston v. Genesee Mu. Ins. Co.*, 12 id., 258; *Newton v. Brewster*, 13 id., 587; *Baldwin v. Van Deusen*, 37 id., 457.) Under the circumstances the new deed would be upheld in equity, and Walter C. would not have been permitted to question its validity. (*Dennison v. Ely*, 1 Barb. S. C. R., 610; *Jackson v. Matsdorf*, 11 John. R., 91.) The case last cited is in point on all the questions made in this case. (2 Wash. on Real Prop., 604-616.) The first deed not having been delivered, no interest passed to the grantee. (*Jackson v. Matsdorf*, 11 J., 95.) Walter C. or his successors, by seeking to avail themselves of the deed, affirm the debt to Walter for the purchase-price. This and the holding the deed make Walter and his successors equitable mortgagees. (*Rockwell v. Hobby*, 2 Sand. Ch., 9.) Being mortgagees in possession, ejectment cannot be maintained. (*St. John v. Bumpstead*, 17 Bar., 100; *Randall v. Roab*, 2 Abb., 300.)

*D. F. Gedney* for the respondent. Delivery of a deed is either absolute or in escrow, and it is the act of the grantor.

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Opinion of the Commission, per LEONARD, C.

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(4 Kent's Com., 544 [454], etc.; *Warrall v. Munn & Prall*, 5 N. Y. R., 229; *Braman v. Bingham*, 26 N. Y. R., 490-493; *People v. Bostwick et al.*, 32 N. Y. R., 447, 448.) The delivery of this deed was absolute. (Folios 69, 70, 71, 72, 73, 76, 77, 88, 308, 309; Willard on Real Estate, 384; *Braman v. Bingham*, 26 N. Y. R., 488, 490, 493; *The Lady Superior, etc., v. McNamara*, 3 Bar. Ch. R., 375, 379; 5 N. Y. R., 229, 238.) Delivery to a third party for the grantee, is all that is necessary to constitute delivery; and the conveyance being beneficial to the grantee, his assent is presumed. (*Church v. Gilman*, 15 Wend. R., 656; Willard on Real Estate, 384, 385, and cases; 4 Kent's Com., 545 [455], 546, 547, note *a*, 10th ed.; 12 Johnson's R., 536; *People v. Bostwick et al.*, 32 N. Y. R., 447, 448, 449; 3 Bar. Ch. R., 379; 5 N. Y., 229; 26 N. Y., 490, 493.) The title passed from Vail; it was not in Walter, it must have been in Collins. (4 Kent Com., 546, note *a*, 10th ed., chap. 3, 285; *Thompson v. Leach*, 2 Vert., 198; *Poe v. Knight*, 5 B. & C., 671; 1 R. S., 728, § 57; *Garfield v. Hatmaker*, 15 N. Y., 475.) Neither Walter nor his successors can make adverse title. (*Jackson v. Davis*, 5 Cow., 129; 4 J., 230.) No adverse possession can be adjudicated on a void title. (*Livingston v. Penn. Iron Co.*, 9 Wend., 511; *Crory v. Goodman*, 22 N. Y., 589, 605.) That the verdict was against evidence is a question not reviewable here. (*Macy v. Wheeler*, 30 N. Y., 237; *East River Bank v. Kennedy*, 4 Keys, 283; *Folger v. Fitzhugh*, 41 N. Y., 228.)

LEONARD, C. The title of the "Vail lot," as it is called, cannot have been in abeyance. It vested in some person upon the execution of the deed of Lewis Vail to Walter C. Everett — clearly the title no longer remained in Vail. The execution and delivery of his said deed, although the grantee was ignorant of its existence, had the effect of divesting him of the title. It was so intended by him as well as by Walter Everett, the father, who paid the consideration money, received the deed and managed the whole transaction of the

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Opinion of the Commission, per LEONARD, C.

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purchase. There are none of the elements of an abeyance, or suspension of the title. No estate in remainder or reversion is limited upon a prior estate. The conveyance is absolute in its terms.

There is no attempt by counsel to treat it as in abeyance; but it is said to have been vested in Walter C. Everett (called in the testimony "Collins Everett"), in trust, or that the deed was taken in his name, and held by his father as security for the payment of the consideration. I am unable to find any evidence of such a purpose. Walter, the father, never disclosed to his son Collins that he had taken the title in his name, or that he expected him to pay for it; nor did Collins ever speak to his father about it. The jury have found that the deed was never delivered to Collins. They were instructed that the plaintiff was entitled to recover, if they found that the deed had been delivered to Collins Everett, and having rendered their verdict for the defendant as to this lot, we must assume that the deed was never so delivered. Clearly no liability existed for the consideration or price of this lot on the part of Collins Everett. He had promised nothing in regard to it. The cases in which title deeds have been held to amount to an equitable mortgage, when delivered to or placed in the possession of a third party, is where there was some debt or obligation to be secured, and where they were delivered for that purpose, or for the purpose of preparing a mortgage or security from them which had not, for some reason, been consummated in the form intended. There is no such element in this case. If the retaining of the deed from Vail by Walter, the father, was as security at all, it must be as security for something in harmony with the facts, something that did not require, as in the case of a mortgage, the consent or concurrence of Collins, the son. He may have designed to retain the possession of the land until some future day, and for that reason did not communicate the fact, and privately retained the deed. He did retain the possession, and the course he pursued would secure the continuance of the possession, without any interruption from the grantee

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Opinion of the Commission, per LEONARD, C.

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named in the deed or his creditors, so long as the secret was maintained.

This is not the case of a deed executed by the father to the son, and afterward retained without delivery. Such deeds have been held, in numerous instances, not to have passed any title to the grantee, because there was no delivery. The grantor retains the title until he has delivered his deed. But here the deed is perfect; and the delivery is absolute as against the grantor. The title could not pass to Walter, the father, for he was not named in the conveyance. He paid the consideration, and received from Vail a deed to his son, with a design. He knew, or at least should be assumed to have known, that, at some period in the then future, the fact would be no longer a secret. Perhaps he expected his son to survive him, in the ordinary course of nature, and take possession at his death. This is more strongly probable than it is that he intended a security or trust in his own favor. He never asked his son to reconvey; and it was not till the disputes after the death of Collins that he destroyed the deed to him, and obtained a new one from Vail. It was then too late to alter his intentions. He could not change the alienee in that way, nor administer justice according to his own notions so summarily.

Can the deed to Collins be regarded, under the peculiar facts of this case, as a trust? After the most careful examination of the argument of the learned counsel for the defendant, and the authorities cited, I find myself drawn to a negative answer. The statute forbids. Of course, there is no express trust. It must be a resulting or implied trust, if any, derived from the payment of the consideration, and the retaining of the deed by the father.

The statute is very definite in its terms, and precisely covers the facts of the case. It is in these words: "Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person

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Opinion of the Commission, per LEONARD, C.

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named as the alienee in such conveyance, subject only to the provisions of the next section." (1 R. S., 728, § 51.)

The next section declares such conveyance presumptively fraudulent as to the creditors, at that time, of the person paying the consideration. It is said that this is a rule only as between the grantor and grantee; but there is no such limitation in the statute, and the contrary rule has been held by the Court of Appeals in *Garfield v. Hatmaker* (15 N. Y., 475).

We are particularly referred to the case of *Jackson v. Matzdorf* (11 Johns., 91), as authority for the appellant. That case occurred before the adoption of the Revised Statutes, which, as held by the leading opinion of Judge Comstock, in 15 N. Y., 475 (*supra*), has made such a sweeping alteration in the law of uses and trusts that it has wholly subverted the former rules as to a resulting trust in favor of the party paying the consideration, under which it was also formerly held that the interest of such party could be seized and sold as a legal estate on execution against him. This result arose, says that able judge, from the relation between the grantee and the person paying the purchase-money, but is entirely overthrown by the present statute of uses and trusts. There is a pure trust in favor of the creditor, which he can enforce only in equity. "The person paying the consideration money must take the conveyance to himself, or he can have no legal or equitable interest in the land." (Page 478.)

Section 51, cited above, was contained in the Revised Laws of 1813; but section 45 of the Revised Statutes, abolishing uses and trusts, except as authorized and modified in the article which contains the sections referred to, was adopted in 1830.

In the case cited from 11 Johnson, the court appear to be uncertain as to placing their judgment upon the doctrine of a resulting trust, even in that day, and finally hold that the title of the person who paid the consideration in that case was good, by reason of his uninterrupted possession for forty years. It is worthy of observation that the plaintiff's lessor in that case obtained his conveyance with full knowledge that the

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Opinion of the Commission, per LEONARD, C.

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deed to his grantor had been taken with the intention of having the title held for the benefit of the person who paid the consideration.

The principle of a resulting trust in favor of the person paying the purchase-money was fully adopted in that case, and is as fully repudiated in 1 Revised Statutes (§ 51, p. 728), and in 15 New York, p. 475 (*supra*).

In my opinion, we must follow the latter authority. The judge at the circuit charged, in this case, that no title passed to Collins Everett by the deed to him, unless it was delivered to him. This was an error.

The question, whether there was an adverse possession by the defendant, so as to render the deed to the plaintiff void, is not before us. The case is here on appeal by the defendant from an order granting a new trial on account of exceptions taken by the plaintiff. If any error occurred at the trial affecting the case on the part of the plaintiff, which was distinctly pointed out and excepted to on his part, as it appears in this case that there did, the necessary result is, that there must be a new trial, unless, upon the whole case, judgment ought to have been rendered for the defendant.

The General Term granted a new trial for errors occurring at the circuit. The defendant appealed, stipulating that judgment absolute be rendered, in case the order appealed from be affirmed. The appeal brings up only the errors complained of by the plaintiff; and those having been considered material, the order so appealed from must be affirmed, with an absolute judgment against the defendant.

If the defendant wished to bring up errors which had been committed affecting her case, she ought to have submitted to a new trial; and if the errors had been then repeated, and the whole case resulted adversely to her on such new trial, she could make a new case or exceptions, and bring up the subject by appeal. But she is now precluded from arguing those questions, because it is not her exceptions, but those of the plaintiff, that have been brought here by the present case or exceptions and the appeal.

## Statement of case.

The order appealed from must be affirmed, with costs, and judgment absolute rendered against the defendant on her stipulation.

All concur.

Judgment accordingly.

GUSTAVUS BUNGE et al., Respondents, v. GERHARD HENRY  
Koop et al., Appellants.

Upon the breach of a contract between the parties, defendants became liable to plaintiffs in damages to the amount of \$6,400, which amount was undisputed. Defendants being unable to pay, it was agreed that if they would borrow of their friends and pay the sum of \$3,500, plaintiffs would settle and compromise, leaving it to defendants' honor to pay when they became able an additional sum, which, with the \$3,500, would amount to seventy-five per cent of the claim. Defendants thereupon borrowed and paid to plaintiffs the \$3,500.—*Held*, that there was no consideration for the agreement of compromise, and that plaintiffs were not concluded from suing and recovering the residue. The question is not affected by the fact that defendants received from the lenders checks for the amounts borrowed, which they delivered to plaintiffs in lieu of the money.

Where, prior to the time for the performance of a contract, one of the parties notifies the other that he will not perform, the latter can maintain an action for the breach without an offer of performance upon his part.

(Argued September 23, 1871; decided January term, 1872.)

APPEAL from judgment entered upon order of the General Term of the Superior Court of the city of New York, denying defendants' motion for a new trial, and directing judgment upon the verdict.

This action was to recover damages for breach of a contract made May 13, 1864, whereby the defendants agreed to deliver to the plaintiffs, at sellers' option, on or before the 31st day of July, 1864, exchange for 10,000 louis d'or thalers, lawful money of Bremen, at sixty days' sight, for the price of one dollar and thirty cents, lawful money of the United States, for each louis d'or thaler, and the plaintiffs claimed damages

48	225
118	610

48	225
120	268

48	225
138	98

48	225
167	289

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Statement of case.

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to the amount of \$6,400, admitting \$3,500 had been paid thereon.

The defendants in their answer, among other things, alleged "that on or about the 30th day of July, 1864, said plaintiffs claimed and demanded from said defendants said sum of \$6,400, which sum these defendants were wholly unable to pay, and thereupon said plaintiffs duly agreed, to and with said defendants, that, provided these defendants should and did induce their friends to raise and loan to said defendants the sum of \$3,500, and would pay the same to said plaintiffs, that said plaintiffs would settle and compromise their alleged demand against said defendants for and upon receiving said sum of \$3,500, to be raised as aforesaid, and would leave it entirely to the defendants' honor whether they should, at any time hereafter, pay said plaintiffs any further sum or amount; and, thereupon, under and in pursuance of said agreement, these defendants, at a great sacrifice and trouble, did borrow from their said friends the said sum of \$3,500, and paid the same to said plaintiffs, with the full understanding and agreement that the plaintiffs should accept and receive the same as satisfaction of the said claim, leaving it entirely to the honor of said defendants to pay an additional sum, which, together with the said sum of \$3,500, should make seventy-five cents on the dollar of the plaintiffs' alleged claim or demand, to be paid when defendants should be able so to do; and these defendants allege that the said agreement above specified, on the part and behalf of said plaintiffs, formed the inducement and consideration to the said friends of said defendants to loan and advance the said sum of \$3,500 as aforesaid; and these defendants insist that they are not legally or justly indebted to said plaintiffs in any sum or amount whatever; and they deny that they ever promised to pay the said plaintiffs said sum of \$2,900, or any sum or amount whatever, since the payment of said sum of \$3,500, as aforesaid, which sum was received and accepted by said plaintiffs in settlement and compromise of their said claim and demand as aforesaid."



## Statement of case.

The action came to trial in January, 1866, before a judge and jury, and the plaintiffs gave evidence of the breach of the contract by the non-delivery of the exchange, and that their damages were \$6,400. The defendants gave evidence tending to show the facts alleged in their answer, as above quoted.

The defendants, in their motion to nonsuit and in their requests to the court to instruct the jury, claimed that the alleged arrangement and compromise constituted a defence to the action; but the court directed the jury to find a verdict for the plaintiffs, which they did, and the defendants excepted.

The court directed the exceptions upon a motion for a new trial to be heard in the first instance at the General Term; and the motion having been made and denied, and judgment entered upon the verdict, the defendants appealed to this court.

*J. M. Van Cott* for appellants. Payment either before the day or at another place is a good consideration for a compromise. (Smith's note to Cumber. & Wane, 1 Leading Cases, 146.) The existing rule as to records is technical, and is departed from on slight distinctions. (*Kellogg v. Richards*, 14 Wend., 116; *Watkins v. Inglesby*, 5 J., 390.)

*Weeks & Foster* for respondents. The alleged agreement to compromise was without consideration. (*Higby v. N. Y. and Harlem R. R. Co.*, 3 Bos., 497, 504; *Cole v. Sackett*, 1 Hill, 517; *Muldon v. Whitlock*, 1 Cow., 306; *Hawley v. Foote*, 19 Wend., 516.) The payment in checks did not change the rule. (*Olcott v. Rathbone*, 5 Wend., 492.) There was no satisfaction; the award was not executed. (*Caston v. Hamilton*, 11 Barb., 149; *Mumford v. McPherson*, 1 J., 417; *The Brooklyn Bank v. De Grauw*, 23 Wend., 343; *Hawley v. Foote*, 19 Wend., 517.) The manner in which defendants procured the money did not change the question. (*Harrison v. Olose*, 9 Johns., 448; *Seymour v. Minturn*, 17 J., 169; *Dedrich v. Leman*, 9 Johns., 333.)

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Opinion of the Commission, per EARL, C.

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EARL, C. The defendants, under their contract, could perform by delivering the exchange on or before July 31, 1864. It so happened that the 31st day of July was Sunday. It is not important in this action to determine which was the last day upon which the defendants could tender performance—whether they could do it upon Sunday or Monday, or whether they were bound to do it upon Saturday. On the 28th or 29th of July, the defendants informed the plaintiffs that they could not perform, and this dispensed with any offer of performance by the plaintiffs on the 31st, or any other day. (*Crist v. Armour*, 34 Barb., 378.)

On the 28th day of July, the defendants informed the plaintiffs that they would not be able to deliver the exchange, and they, then entered into negotiation with the plaintiffs for a compromise of the damages, and finally, as there was evidence tendency to show, the arrangement set up in the answer was concluded, and on Saturday they paid the \$3,500, agreeing to pay the balance, up to seventy-five cents on the dollar, when they should become able.

There was no consideration for the alleged agreement. In paying the \$3,500, the defendants did no more than they were bound to do. The \$3,500 was only a portion of the whole sum which they were liable to pay, and its payment could not therefore furnish a consideration for the agreement to take less than the balance due, or for extending time for the payment of such balance. (*Harrison v. Close*, 2 Johns., 448; *Dedrick v. Leman*, 9 Johns., 333; *Palmerton v. Husford*, 4 Denio, 166.)

This was not the settlement of a disputed or doubtful claim. It is not so alleged in the answer. The answer assumed, and the parties in all stages of their negotiations assented, that the plaintiffs' claim for damages was \$6,400; and the undisputed evidence upon the trial showed that it was so much. Hence the compromise could not be upheld as the settlement of a disputed or uncertain claim. Neither was the \$3,500 paid in advance, so as thus to furnish a consideration for the agreement. Such a consideration was not thought of by the

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Opinion of the Commission, per EARL, C.

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parties, and was not claimed in the answer nor upon the trial. The defendants had the option to fix the day of performance at any time before the 31st day of July, and they fixed it for all purposes on the 29th or 30th of July, and treated the contract as ended, and their liability to damages as fixed and certain.

The defendants alleged in their answer, and gave evidence tending to show, that it was the agreement that the compromise and extension should be effected, if they could induce their friends to raise for and loan to them the \$3,500. They proved on the trial that to enable them to make the compromise their friends loaned them \$3,000, and that, with \$500 of their own money, they paid the \$3,500 to the plaintiffs.

This agreement to thus get the money from their friends was chiefly relied upon by the defendants in their answer and upon the trial as furnishing the new consideration for the compromise. I cannot assent to this claim. The money, when paid, was to belong, and in fact did belong, to the defendants. It was to be paid and was paid as their money. Suppose a debtor agreed to go to work and earn the money, or to dig for it in the earth, would this furnish a new consideration to uphold an agreement of the creditor to take less than his conceded due? In all cases, an embarrassed debtor must make some effort to procure the money to make a compromise, but no case can be found holding that the fact that he had agreed to make such effort, furnishes any consideration to uphold the compromise. The debtor is legally bound to pay, and it is utterly indifferent to the creditor where he gets the means to do it; that is, the matter of the debtor, and all his efforts, are expended in simply endeavoring to discharge a legal obligation. Hence the fact that the defendants agreed to induce their friends to loan them the money, and that they did induce them to loan it, furnishes no new consideration to uphold the compromise.

It matters not that the \$3,000 which the defendants received from their friends was in checks, which they handed

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Opinion of the Commission, per HUNT, C.

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over to the plaintiffs. If the plaintiffs had agreed to receive the notes of a third party, or any specific personal property, in payment and satisfaction of their claim, it would have been fully paid and satisfied, no matter how small the value of the note or property was. But here the agreement, as alleged in the answer, and proved, was that the defendants should pay the \$3,500 in money, and this they undertook to do in the checks; they were paid and received as money.

I have, therefore, reached the conclusion, upon the whole case, that the facts, as claimed by the defendants, do not constitute a defence to the balance claimed by the plaintiff, either as constituting payment or an accord and satisfaction; and the judgment must be affirmed, with costs.

HUNT, C. The answer alleges, in brief, that under the contract set forth, the plaintiffs claimed on the 30th of July, 1864, the payment of \$6,400; that the defendants are unable to pay the same; that it was then agreed that if the defendants would induce their friends to raise and loan to them the sum of \$3,500, and the defendants should pay the same to the plaintiffs, the plaintiffs would compromise their alleged demand upon receiving that sum, and leave it to defendants' honor whether they should thereafter pay any further sum; that therefore, in pursuance of such agreement, at a great sacrifice, the defendants did borrow from their friends the sum of \$3,500 and paid the same to the plaintiffs, with the agreement that the same should be accepted in satisfaction of the claim, leaving it to the defendants' honor to pay an additional sum, which, together with the \$3,500, should make seventy-five cents on the dollar of the plaintiffs' demand, to be paid when the plaintiffs should be able to do so; that the money was loaned to them by their friends upon the inducement and consideration above mentioned.

In my judgment, this answer sets forth no defence to the action. It is based upon the fallacious idea that the manner and terms upon which the defendants obtained the \$3,500 can make the payment of a less sum than the admitted debt a good

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Opinion of the Commission, per HUNT, C.

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accord and satisfaction. Two well-settled principles show the unsoundness of this theory. 1. A debt of \$1,000 from A. to B. cannot be discharged by the payment of a less sum, nor will same be an accord and satisfaction, however positive the agreement to that effect may be. There is no consideration for such an agreement, and nothing short of a formal release will produce a discharge of the debt (*Cole v. Sackett*, 1 Hill, 517; *Muldon v. Whitlock*, 1 Cow., 306; *Hawley v. Foote*, 19 Wend., 516.) The general rule is not denied.

2. The money, when borrowed from the friend of the defendants, instantly became the property of the defendants. They borrowed it, and it was theirs. Its possession for an hour or a minute made it as certainly their own as if they had held it for a month or a year. If they had deposited the borrowed checks to their own credit in bank, and paid the plaintiffs in their own check or in bank currency, the transaction would have been perfectly correct toward the lenders and the same to the plaintiffs. The payment to the plaintiffs from the specific funds receive, or from other sources, cannot affect the rights of any one. The defendants, then, with their own money, compromise their debt with the plaintiffs; and when, where or how they supplied their funds or credit does not enter into the consideration of the case.

The principle that the pleading is to be construed most strongly against the pleader is useful in this case. (*Slocum v. Clark*, 2 Hill, 475; *Ferrie v. N. A. F. I. Co.*, 1 Hill, 71.)

The answer alleges that the plaintiffs, on the 30th of July, 1864, "claimed" from the defendants the sum of \$6,400, and it is again called "the alleged demand" of \$6,400. It is nowhere averred in the answer that this sum of \$6,400 was not actually due to the plaintiffs. The undisputed testimony on both sides, including the evidence of one of the plaintiffs and of one of the defendants, shows this to have been the actual amount due upon breach of the contract to deliver exchange. We may, therefore, safely dispose of the case as if the answer had stated that the sum of \$6,400 was justly due to the plaintiffs, and that the arrangement was made for the

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Statement of case.

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satisfaction thereof by the payment of \$3,500, as already set forth.

In his additional points, the appellants' counsel concedes that if the allegations of the answer do not set up a good accord executed, the verdict is right and the judgment must be affirmed. Upon the view I have taken, such must be the result.

All concur. Judgment affirmed.

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FRIEND W. MILLER, Respondent, v. ELIZA KNOX et al.,  
Appellants.

It is the duty of executors and administrators to receive the rents and profits of premises leased to their testator or intestate, accruing after his death, and to the extent of the rent reserved in the lease, to apply them in payment thereof, instead of placing them among the general assets; and they are personally liable for the rent, to the extent of the rents and profits received by them. *Prima facie*, these are sufficient to pay the whole rent; if not, it is matter of defence.

A landlord may collect the rents, accruing after the death of his tenant, of the estate of the deceased, or of the executors or administrators personally, to the extent of the rents and profits of the premises received by them, and the balance, if any, of the estate.

(Argued September 20, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment in favor of plaintiff entered upon the decision of the court.

This action was brought to recover of the defendants a balance claimed to be due from them to the plaintiff for the rent of certain premises known as 326 Greenwich street in the city of New York. On the trial before a referee, it appeared that on the first day of February, 1857, one Nicho-

## Statement of case.

has Quackinboss leased to Charles Knox the said premises for the space of four years and three months, at the rate of \$1,000 and Croton tax per year, with the privilege of remaining on the premises five years after the expiration of the four years, at the rent of \$1,500 per year and Croton tax. On the 10th of February, 1858, Charles Knox, by and with the consent of Quackinboss, assigned the lease to Edward Knox. On the first day of November, in the same year, Quackinboss conveyed the demised premises to the plaintiff. On the 11th of May, 1863, Edward Knox died; on the nineteenth of the same month (May, 1863) letters of administration upon his estate were granted to the defendants, who, on the 16th day of March, 1865, rendered to the surrogate who granted the letters a final account of their administration, in which they charged themselves with \$854.19 for various sums collected from the leasehold premises from the date of their appointment to June 1st, 1864. The plaintiff, upon being duly cited to appear before the surrogate on the day fixed for the final settlement of accounts, appeared and by his attorney filed the following objections:

1st. That the amount of rent collected should have been paid to the plaintiff instead of being included in the assets to be distributed.

2d. That the amount of rent due from May 1st, 1863, to November 1st, 1864, \$2,250, has not been inserted as a debt entitled to be paid from the assets of the estate; and

3d. That the rent from May 1st, 1863, to November 1st, 1864, with interest, should be paid by the said administrators before any debts due by the deceased at the time of his death.

On the sixth of the following April (1865), the accounts were, by an order of the surrogate, referred to an auditor for settlement, with directions to the auditor that, before he should proceed with the objections made by the plaintiff, the latter should present his claim duly verified to the defendants. The plaintiff did not present his claim, verified or otherwise, to the defendants. He was, notwithstanding, cited to appear

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Statement of case.

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before the auditor, and did appear but withdrew. There is no evidence that he ever withdrew the objections. Before the final hearing before the auditor this action was commenced. The auditor, on the 20th of June, 1865, made his report, in which he made no mention of the plaintiff or his claim, except to say that he had failed to present his claim as required by the order of the surrogate, after two adjournments had been allowed to enable him so to do, and that he had withdrawn from the proceeding. Upon the report of the auditor, the surrogate in July following made his decree distributing the assets, in which he included as assets the proceeds of what the defendants had received from the leasehold premises since the death of Edward Knox; the whole assets amounting to about twenty-one per cent of the debts due from Knox at the time of his death. No award was made in the decree in favor of or against the plaintiff, or mention made of him except to say that on the return day of the original citation the plaintiff a creditor appeared before him by counsel.

The referee found as a fact in the case "that a final decree was made by the surrogate that the plaintiff should be paid ratably with the other creditors, without preference;" that the plaintiff did not appear after filing his objections in writing before the surrogate, "and that the defendants, immediately after their appointment as administrators, entered into possession of said premises, and continued therein and collected the rents therefrom until the first day of June, 1864." And, as a conclusion of law, he found "that the proceedings before the surrogate were no bar to the plaintiff's right to recover in this action; that the defendants were personally liable for the rent of the premises;" to each of which findings the defendants excepted. The referee further found that the rent and interest amounted to \$1,735.67. To this finding there was no exception. For which amount, with five per cent additional allowance, he ordered judgment.

*Samuel Hand* for appellants. There is no evidence charg-



## Opinion of the Commission, per GRAY, C.

ing defendants for rent, and an exception thereto presents a question of law. (*Wegman v. Childs*, 41 N. Y., 159; *Mason v. Lord*, 40 N. Y., 476.) They are only liable *de bonis testatoris*. (*Pugsley v. Aiken*, 1 Kern., 494.) If personally liable, it is only to the extent of the amount received by them. (COLERIDGE, *arguendo*, *Tremeere v. Morrison*, 1 Bing. N. C., 89; *Helier v. Casbert*, 1 Sid., 266; *Remnant v. Bremridge*, 8 Taunt., 191; *Wilson v. Wigg*, 10 East., 315; *Fisher v. Fisher*, 1 Bradf., 335.) The decree of the surrogate is conclusive against plaintiff. (*Ross v. Lewis*, 3 Lansing, 321; *White v. Coatsworth*, 2 Seld., 137; *Demarest v. Davy*, 29 How., 226, 275.)

W. McDermot for respondent. Defendants are liable personally as assignees of the term. (*Matter of Galloway*, 21 Wend., 32; *Denniston v. Hubbell*, 10 Bos., 162; *Jones v. Hansmen*, 10 Bos., 176; *Martin v. Black*, 9 Paige, 644; *Williams' Executors*, Philadelphia ed., 1832, pp. 1076-7.) The surrogate had no jurisdiction to pass upon disputed claims. (*Wilson v. Baptist Education Society*, 10 Barb., 308; *Disosway v. Bank of Washington*, 24 Barb., 60; *Andrews v. Wallege*, 17 How. Pr. R., 263; *Curtis v. Stilwell*, 32 Barb., 354; *Tucker v. Tucker*, 4 Keyes, 136.)

GRAY, C. The finding that in the final decree of the surrogate the plaintiff was to be paid ratably with the other creditors is not only without proof to sustain it, but the evidence furnished by the decree itself is to the contrary. The error being rather in favor of the defendants than otherwise, is not a ground of exception by them; nor does the finding that the plaintiff did not appear in the proceedings before the surrogate after filing his objection, though not literally accurate, prejudice the defendants, unless he appeared, waiving his objection against the right of the defendants to include as assets, to be distributed among the creditors, the rent which had accrued out of the leasehold premises since the death of Edward Knox. He did not pre-

## Opinion of the Commission, per GRAY, C.

sent his claim to the defendants as one against the estate, verified in any way in compliance with the order of the surrogate, or do any other act from which it could be inferred that he intended to waive his protest against the right of the defendants or of the surrogate to appropriate the income of his property to those to whom it never belonged, and who not as against the plaintiff had the slightest equitable claim to it. On the contrary, as is quite clear from the facts that the estate was insolvent, the income from it much less than the rent reserved, and that he withdrew from before the auditor, before his report was made, and commenced this action, he never intended to submit the claim sued upon to the judgment of that officer.

The finding that the defendants, immediately after their appointment as administrators, entered into the possession of the demised premises, and continued therein and collected the rents therefrom until the first day of June, 1864, is fully sustained by their account rendered to the surrogate; and although that account does not contain an admission, in terms, that they entered into possession of the premises, the admitted fact that they collected the rents for that period amounts to the same thing. (*In re Galloway*, 21 Wend., 32, 33.) The conclusion of law, that the proceedings before the surrogate were no bar to this action, was, upon principle, right, and is fully sustained by authority. The estate of Edward Knox was worth but about twenty per cent of his indebtedness; the value of the leasehold estate did not, since his death, exceed in amount the rent reserved; and hence nothing came to the defendants' hands to be divided among his creditors. (Toller, 143, 279; *Rubery v. Stevens*, 4 Barn. & Ad., 241, and note *a*; Wms. on Exrs., 4 Am. ed., 1489, 1490.) It was against the plaintiff's protest that the surrogate took jurisdiction of the rents collected, and, without right, distributed them. The conclusion that the plaintiff was entitled to recover was also right. Upon that point the authorities were, as BRONSON, J., said *In re Galloway* (21 Wend., 33), all one way. It is not so clear that the referee

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Opinion of the Commission, per EARL, C.

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was right in ordering judgment for a sum exceeding the amount received for rent; but upon this point no exception was taken, and hence the question is not up for consideration. The judgment must be affirmed.

EARL, C. The lease from Quackinboss to Charles Knox provided that the lessee should have the privilege of remaining in possession after the specified time, for the further term of five years, at the yearly rent of \$1,500. On the 10th day of February, 1858, Charles Knox assigned this lease to Edward Knox, who entered into possession of the premises, and remained in possession until May 11, 1863, when he died. After his death the defendants, as his administrators, took possession of the premises, and let them and collected the rents. I have no doubt that the privilege, under the lease, of extending the term, passed to Edward Knox as assignee. And the occupancy of the premises by him and his administrators, after the expiration of the original term, furnished *prima facie* evidence that he had availed himself of this privilege, and that the premises continued to be occupied according to the terms of the lease. This lease, upon the death of Edward Knox, passed to his administrators, and became a portion of the assets in their hands. If the lease was worth anything, it was their duty to sell it, or to assume control of the premises and collect the rents, or in some form secure the profits thereof. If they either took possession of the premises or received the profits or collected the rents thereof, they became personally liable for the rent, to the extent of the rents or profits received by them. Administrators do not become personally liable for the full amount of the rent reserved in the lease, unless the rent or profits of the premises are at least equal to the amount of the rent. A landlord, after the death of his tenant, always has these remedies for rent accruing after the death: He may collect the same of the estate of the deceased, or he may collect the same of the administrators or executors personally to the extent of the rents or profits received by them of the premises; and he

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Opinion of the Commission, per EARL, C.

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may collect of the executors or administrators so much of the rent as they are personally liable for, and the balance, of the estate. This personal liability of the administrators and executors grows out of the fact that it is their duty to receive the rents and profits, and to the extent of the rent, apply them in payment thereof, instead of placing them among the general assets. That the rents and profits are not sufficient to pay the rent is, however, strictly matter of defence, as the law *prima facie* supposes them to be sufficient. These principles are abundantly established by the authorities. *Remnant v. Bremridge*, 8 Taunt., 191; *Matter of Galloway*, 21 Wend., 32; *Fisher v. Fisher*, 1 Bradf., 385; Taylor's Landlord and Tenant, 211; Williams on Executors, 1491.) In *Matter of Galloway*, COWEN, J., says: "It is perfectly well settled that when rent or money for breach of covenant falls due after the death of the testator or intestate, and the executor or administrator enters, or, which is the same thing, receives the rents and profits, he is chargeable in the *debit* and *detinet* or directly on the covenant as an assignee, and need not be named as executor or administrator. In certain special cases he may, it is true, defend in fact, as when he has no assets, and the land is in truth worth less than the sum due. But this is strictly matter of defence; *prima facie*, the land is worth more."

Here the defendants did not allege in their answer and did not attempt to prove upon the trial that the lands were worth less, or that the rents collected by them were less than the rent reserved, and hence there was no error in awarding judgment against them personally for the full amount of the rent, unless the proceedings in the Surrogate's Court of New York in some way, furnish them a defence.

As a creditor of the estate of the intestate, the plaintiff was a proper party to the accounting. He became such by the service upon him of the citation. His position was not altered because he appeared and filed objections. He presented no claim, litigated nothing and withdrew from the proceeding. There was no adjudication upon his claim for

## Statement of case.

rent. He was a proper party, as he was a creditor of the estate, having the right to look to the estate for the payment of his rent. His claim against the defendants personally was in no way involved and could in no way be brought in question in that proceeding, and he is therefore not precluded by it. (2 R. S., 94, § 65.)

The judgment should therefore be affirmed with costs.

All concur, except LEONARD, C., not sitting.

Judgment affirmed.

EDWARD WHITEHOUSE, Respondent, v. THE BANK OF COOPERSTOWN, impleaded, etc., Appellant.

An entry was made upon the journal of a bank in the regular day's business, charging certain mortgages held by the bank to the president and principal stockholder, who was the mortgagor, against a credit to him of a larger amount appearing upon the books of the bank. The book-keeper, who made the entry, had no recollection of the transaction. The mortgages were subsequently transferred by the bank to a *bona fide* purchaser for their face, the president and the bank representing them, to be wholly unsatisfied and valid liens.

In an action by a subsequent incumbrancer to remove the liens of the mortgages,—*Held*, that the entry alone, without some evidence of its adoption by the mortgagor and the bank, was not sufficient proof of the payment of the mortgages; and the subsequent action of both, in negotiating the mortgages rebutted any inference of acquiescence or adoption. (LORT, Ch. C., dissenting.)

(Argued September 25, 1871; decided January term, 1872.)

APPEAL from a judgment of the General Term of the Superior Court of Buffalo, affirming a judgment of the court, on the trial at Special Term, in favor of plaintiff. It appeared that in January, 1849, five several mortgages were, for a valuable consideration, duly executed, acknowledged and delivered by Aaron D. Patchen and wife to Aaron D. Patchen as president of the Patchen Bank of Buffalo, upon certain lands in Erie county, to secure the payment of several sums of money amounting in the aggregate to something over \$7,300, each of which was duly recorded in the office of the clerk of the

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Statement of case.

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county of Erie, and afterward in the same month (January, 1849) duly assigned and delivered by Patchen, as president of the Patchen Bank of Buffalo, to the comptroller of this State, his successor or successors in office, or assigns, for and as a security for the redemption of the bills or notes of that bank. While these several mortgages were the property of the State and in the possession of the banking department thereof, and on the 2d day of January, 1854, Patchen and wife executed and delivered to the plaintiff another mortgage covering the same premises described in the previous five mortgages to secure the payment to him of something over \$18,000, the execution of which having been on the 9th day of February, 1854, duly acknowledged, was, in the same month, duly recorded in the office of the clerk of said county of Erie; after the execution and delivery of this mortgage to the plaintiff, and on the 20th day of February, in the same year, each of the several five mortgages by reassignment became again the property of the Patchen Bank. The plaintiff proved, under objection, by a party, that he had been a book-keeper in the Patchen Bank; that four days after these mortgages were reassigned to the Patchen Bank, he, as such book-keeper, made an entry on the journal of the bank, which appeared in that day's business of the bank, charging these five mortgages to Patchen against a credit to Patchen for a larger amount then appearing on the books of the bank; at the time of testifying, he had no recollection of the transaction. This entry was the only evidence of the payment by a surrender to Patchen of these several mortgages.

On the fifth of the following April the defendant, the Bank of Cooperstown, relying upon the representations of Aaron D. Patchen and the Patchen Bank that each of the several five mortgages were wholly unsatisfied and valid liens upon the premises in them respectively described, and in ignorance of any pretended payment of either of them, purchased them of the Patchen Bank and paid for them therefor the full amount of principal secured thereby, and received from the Patchen Bank an assignment of them; and on the day following

## Statement of case.

(April 5th, 1854) assigned the same to the superintendent of the banking department as security for the circulating notes or bills issued to it. Default having been made in the payments upon plaintiff's mortgage, he commenced an action to foreclose it. In that action the defendants here were not made defendants. Plaintiff recovered judgment of foreclosure, under which, in September of the same year, he purchased the mortgaged premises. In August following (1863) the plaintiff brought this action making Van Dyck, as superintendent of the banking department, and the Bank of Cooperstown, the only parties defendants, alleging that the five mortgages held by them as herein stated were, on or about the 24th day of February, 1854, fully paid and satisfied by Aaron D. Patchen to the Patchen Bank, and, hence, demanded that they be, as against his mortgage, declared invalid or liens subordinate to it; and the court at Special Term, upon the evidence as herein stated, found, as a fact, that on the 24th day of February, 1854, the said five mortgages were, each of them, fully paid by Aaron D. Patchen to the Patchen Bank of Buffalo, and became thereby fully satisfied; to which finding the defendants duly excepted. The legal conclusion of the court was, that the defendants five mortgages were a lien subordinate to the plaintiff's mortgage, and ordered judgment that unless the defendants redeem in six months they be forever barred; to which conclusion of law the defendants excepted. Judgment was entered as ordered.

*J. L. Burditt* for appellants. [Points not received by reporter.]

*John Ganson* for respondent. The making of the entries *per se* produced the payment. (*Jermain v. Denniston*, 2 Seld., 276; *Pratt v. Foote*, 5 Seld., 463.) The mortgages were transferred after they were paid, and as against plaintiff defendants so took them, and they cannot claim they were resuscitated as to plaintiff by any act between them and the mortgagor. (*Mickles v. Townsend*, 18 N. Y. R. [4 Smith],

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Opinion of the Commission, per GRAY, C.

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575; *Purser v. Anderson*, 4 Edwards' R., 17; *Rosevelt v. Bank of Niagara*, 1 Hopkins, 579; affirmed, 9 Cowen, 409.) Defendant is entitled to redeem the premises from plaintiff. (*Brainard v. Cooper*, 6 Seld., 366; *Bogert v. Coburn*, 27 Barb., 230.)

GRAY, C. This case presents but a single question for our consideration, and that is, whether the mere entry by the book-keeper of the Patchen Bank of a charge upon the journal of that bank, of which Patchen was president, and in which he was a principal stockholder of these five mortgages to Patchen against a credit to him of a larger amount appearing on its books, though the entry appeared as if it was made in the ordinary business of the bank on the day of its date, was unsupported by any evidence that Patchen desired thus to pay the mortgages, or that the bank desired to have them thus paid sufficient to justify a finding that the mortgages were paid. The fact that Patchen was president of the bank, and one of its principal stockholders, did not destroy its individuality. There yet remained two parties to be affected by the entry: one the Patchen Bank, and the other Aaron D. Patchen, neither of whom had the right without the consent of the other to authorize such an entry, and the book-keeper of the bank, unbidden by either, clearly had no right to make it. He, so far as his recollection served him, was without any knowledge as to whether the parties had agreed upon such a mode of payment; his only knowledge on the subject was that the entry appeared there in his handwriting, but he was destitute of any recollection why it so appeared. He had no right to negotiate or agree for the parties; his duty as book-keeper was limited to the entry of what others directed. (*Potter, Receiver, v. The Merchants' Bank of Albany*, 28 N. Y., 641.) Unless, therefore, there was some evidence of the adoption of this entry as well by Patchen as by the bank, the inference that Patchen had in this way paid the mortgages was not justified. What occurred after the entry, instead of affording evidence of acquiescence or adoption, establishes the



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Dissenting opinion per LOTT, Ch. C.

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reverse. On the fifth of the following April, the bank and Patchen both asserting that the mortgages were wholly unpaid, the bank for a full price sold and assigned them to the defendants. The Bank of Cooperstown and Patchen continued to pay the interest upon them. There is a further fact, not without some significance, and that is that the plaintiff, after the lapse of seven years after the making this entry, foreclosed his mortgage, making a large number of persons whom he alleged to be subordinate incumbrancers, parties; omitting to include the defendants, thus affording an inference that these mortgages were, as all parties then understood, unpaid. It is quite unnecessary to pursue the discussion, inasmuch as we may place our disposition of the case upon authority. (*Gibson T. Williams and others v. The same defendants*, Court of Appeals not reported.) These cases are in all respects alike, except that in the case referred to the mortgage was over due; in this they were not due. This difference in fact fails to make one in principle. The rule of evidence is the same in each case. The judgment appealed from should be reversed and new trial granted, costs to abide event.

LOTT, Ch. C. (dissenting). The findings of fact by the judge at Special Term, were supported by considerable evidence, and having been affirmed by the General Term on appeal, are conclusive on us and not open to our review. They clearly warrant his conclusions of law. The judgment entered thereon must therefore be affirmed, unless the evidence given against the defendant's exceptions, to which reference has been made in the statement of the case, was improperly admitted.

It consisted of entries made by a clerk of the Patchen Bank, as he testified, in its books, in the usual course of its business on the day of their respective dates, showing that the five bonds and mortgages in question, were, on the 31st day of January, 1849, credited to Aaron D. Patchen in his individual account; that a bond and mortgage account,

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Dissenting opinion per LOTT, Ch. C.

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kept in a journal and ledger of the bank, called bank journal and ledger, was on the same day debited therewith, and subsequently again credited, and a further entry under date of 25th February, 1854, in the following terms, viz.:

“ Superintendent of Bank Department, Cr.  
A. D. Patchen bonds and mortgages withdrawn, \$24,115.75.”

The reading of the said several entries was objected to on the part of the defendants, “on the ground that the book is not evidence to prove any fact against them,” and no other objection thereto appears to have been given or assigned. This ground of objection is not tenable.

The defendants held the mortgages in question under an assignment executed after they had become due and payable, and the entries were admissible as links in the chain of evidence to show the fact of their payment to the Patchen Bank their assignor, when it was the holder of them.

There was nothing in the ground of objection to indicate that the matters stated in the entries were objected to as the declarations or statement merely of their assignor. It would not have altered the case if such further ground had been stated. It is held, by the decision of this court, in *Jermain v. Denniston* (2 Seld., 276), that such entries are more than the declarations of the assignor, that they are its acts.

I, however, do not see that the defendants can in any degree be prejudiced by their admission, — assuming them not to have been legally admitted. They, if disconnected with the evidence subsequently given to prove payment, only showed that the Patchen Bank received the bonds and mortgages from Aaron D. Patchen, and that at a subsequent date credit was given therefor by it to the bank department, from which, according to the evidence introduced by consent (before the proof of such credit was given) they had been received.

There is a further reason why the admission could not operate to their prejudice.

It appears that, after all those entries had been admitted,

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Dissenting opinion per LOTT, Ch. C.

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the plaintiff introduced and read, without objection, an entry under date of February 25, 1854, as follows :

“ A. D. Patchen, “ Amount of your bonds and mortgages with comptroller withdrawn.....	<i>Dr.</i>   \$24,115 75”
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The bonds and mortgages in question were confessedly included in, and formed part of, the above amount.

After that entry was read the witness who had testified in relation to it and the previous entries said, further, without objection thereto, as follows: “This entry is posted in individual ledger C, of the Patchen Bank, at page 1443, in the account of Aaron D. Patchen; all the entries which have been read from the several journals were in my handwriting, and were made at their date, in the usual course of business; some of the posting in the ledger is in the handwriting of Mr. Cameron, who was a clerk also in the bank; on the morning of January 31, 1849, before the mortgages were credited to A. D. Patchen, his account on the books of the Patchen Bank stood creditor \$25,430.18; that is the balance standing to his credit, after deducting the debts; A. D. Patchen had a regular account with the bank kept on these books, from that time down to this time; these mortgages were charged to him on 25th February, 1854; this account is composed of daily debits and credits; at the close of the business on the 24th day of February, 1854, A. D. Patchen had a balance standing on the books of the Patchen Bank, to his credit, of \$24,657.50; at the close of the business on the 25th of February, 1854, after these mortgages had been charged to him, there was a balance in his favor of \$541.75 standing in the bank books;” and subsequently he, without objection, also said: “I have examined the books of the bank now here before me, and I find no entries of these thirteen bonds and mortgages in the accounts of Mr. Patchen after the 25th of February, 1854.” This is followed by a statement that “the evidence of this witness as to the entries on the books of the Patchen Bank was all given with the books open before him, containing the entries spoken

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Dissenting opinion per LOTT, Ch. C.

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of by him; and these books are all the books of the bank referring to Mr. Patchen's account." It was then proven, on the cross-examination of this witness by the defendants, that the Patchen Bank was organized in 1844, with a capital of \$100,000; that the said Patchen was the principal stockholder, and that the stock not owned by him was at one time owned by Thaddeus W. Patchen, and afterward by Thaddeus Patchen, and the amount thereof was subsequently shown to be \$10,000; that the witness went into it in 1847, and left in March, 1854, having been absent in the meantime (in 1852) about one year, acting part of the time as book-keeper, and part of the time as teller; and that the said Aaron D. Patchen was the president and managing officer of the bank. Under this proof, all the entries in the account of the said Patchen must be assumed to have been known to him; and as there were no entries of these bonds and mortgages in that account, found by the witness or otherwise shown, after the 25th day of February, 1854, when they were charged to him, the presumption is that he assented to that charge, and both he and the bank were, under the decision in *Jermain v. Denniston* (*supra*), bound thereby, and, consequently, that the evidence contained in the entries objected to was wholly immaterial, and no possible injury could result therefrom to the defendants.

It appears in the case that the admission in evidence of the judgment record, in the action for the foreclosure of the plaintiff's mortgage, was objected to, and that an objection was also made to the competency of the plaintiff as a witness, to prove that, until about the time the action to foreclose his mortgage was commenced, he did not know that the mortgages held by the defendants had been reassigned to the Patchen Bank, or that the Patchen Bank had charged them to A. D. Patchen, on the ground that the plaintiff was not a "competent witness, under section 399 of the Code, to speak to that fact," it having been shown that Patchen had died previous to the trial in July, 1864.

Both of these objections were overruled, and exceptions

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Statement of case.

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were taken to the decision. They have not been urged on the argument, and I assume them to be abandoned. They were clearly not well taken.

My conclusion upon the whole case is, that there is no ground shown for the reversal of the judgment. It is, however, proper to add that the case of Williams against these same defendants, decided by the Court of Appeals in March, 1871, in favor of the defendants, in which the opinions delivered therein were cited on the argument, and copies thereof subsequently sent to us, is distinguishable from this in several respects. The bond and mortgage in question in that case were not due when they were charged to Patchen.

There was some additional testimony given in this case, and there were some findings and exceptions in that case, not in this. Under such circumstances the decision therein cannot be considered as controlling that to be made by us.

It follows, from the views above expressed, that the judgment appealed from must be affirmed, with costs.

All concur for reversal, except Lott, Ch. C., dissenting.

Judgment reversed and new trial ordered, costs to abide event.

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48	247
158	166

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THE MERIDEN BRITANNIA Co., Respondent, v. GODFREY N.  
ZINGSEN, Appellant.

A parol promise to assume an antecedent debt of a third person, upon consideration that the creditor will cancel and extinguish the debt and release the debtor, which is done, is not within the statute of frauds, and is valid.

Two instruments, executed at the same time, and relating to the same subject-matter, must be construed together as if one instrument.

Where it appears, by the terms of an agreement or the nature of the case, that the performance of one party was to precede that of the other, an action can be maintained against him who was to do the first act, although nothing has been done or offered by the other.

(Argued September 25, 1871; decided January term, 1872.)

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Statement of case.

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APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment entered upon the report of referee in favor of the plaintiff.

This action is brought to recover a balance claimed to be due upon a contract by which defendant assumed to pay the debt of a third person.

The defence is, that the agreement is void under the statute of frauds, found among other things as follows :

On the 31st day of January, 1861, one L. H. Mattison was indebted to the plaintiff in the sum of \$1,580.07, which indebtedness the said Mattison was unable to pay.

A verbal agreement was made between said Mattison and the defendant, Godfrey N. Zingsen, that if Zingsen would settle said debt with plaintiff, so that Mattison could be released, Mattison would pay said Zingsen the amount thereof as follows, viz. : \$1,000 in cash, and the balance in notes without indorsement.

An agreement was thereupon made in writing between said plaintiff and said defendant as follows, viz. :

“NEW YORK, *January 31, 1861.*

“I agree to furnish to the Meriden Manufacturing Company an assortment of plated forks and spoons per L. H. Mattison's price list, at 70 per cent discount, to settle claim against L. H. Mattison, to be delivered in months of February and March. Oval tip'd and Olive not to be ordered.

“The plain and tip'd goods not to exceed  $\frac{1}{2}$  of the amount. The spoons and forks to be silver plated like sample shown.

“(Signed.)

G. N. ZINGSEN.”

“This is to certify that we agree to give our claim against L. H. Mattison up to G. N. Zingsen as soon as he has delivered to us the amount at 70 per cent discount, in spoons and forks as per his agreement.

“(Signed.)

“Meriden Britannia Company,  
H. C. WILCOX.”

## Opinion of the Commission, per EARL, C.

H. C. Wilcox was the agent of the company. The said written instruments were made and delivered at one and the same time.

About the same date, Mattison, according to his agreement with defendant, paid him \$1,000, and gave to him notes, payable at various dates, amounting in the aggregate to \$594.50.

On or about the same date the plaintiff released Mattison from the said claim against him. Defendant had delivered to the plaintiff, pursuant to the agreement, plated ware to the amount of \$1,225.19; and a balance amounting to \$354.88 remained due to the plaintiff, for which sum, with interest, the referee ordered judgment in favor of the plaintiff.

*C. Bainbridge Smith* for the appellant. The agreement was void under the statute of frauds. (2 R. S., p. 135, § 2; *Mallory v. Gillett*, 21 N. Y. R., 412; *Brewster v. Silence*, 8 N. Y. R., 206; *Draper v. Snow*, 20 id., 331; *Hall v. Farmer*, 5 Denio, 484; S. C., affirmed, 2 N. Y. R., 553; *Berly v. Rampacher*, 5 Duer, 183; *Calkins v. Collins*, 3 Barb., 305; *Baldwin v. Palmer*, 10 N. Y., 232; *Kingsley v. Balcom*, 4 Barb., 131; *Stern v. Drinker*, 2 E. D. Smith, 401; *Fay v. Jones*, 18 Barb., 340; *McKnight v. Dunlop*, 5 N. Y., 537; *Collier v. Coates*, 17 Barb., 474.) To entitle plaintiff to recover, it should have been alleged and proven that it had tendered and was ready and willing to transfer the debt to defendant. (*Dunham v. Pelter*, 8 N. Y., 508; *Lester v. Jewett*, 11 N. Y., 453.)

*W. Gleason* for the respondent. The papers executed and delivered at the same time are to be read together and constitute one agreement. (*Van Horne v. Crain*, 1 Paige, 455; *Rawson v. Lapman*, 1 Seld., 461.) The agreement was valid. (*Mallory v. Gillett*, 21 N. Y. R., 412; *Brewster v. Shelton*, 8 John. R., 376.)

EARL, C. There are two theories, upon either of which this judgment can be upheld. We may treat the defend-

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Opinion of the Commission, per EARL, C.

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ant's agreement as one to pay and discharge the debt of Mattison.

This agreement the defendant claims to be void under the statute of frauds, which provides that "every special promise to answer for the debt, default or miscarriage of another person" shall be void, unless such promise be in writing, expressing the consideration thereof and subscribed by the promisor.

It is not every verbal promise to pay the debt of another that is void within this statute. There are many exceptions, as disclosed by the numerous cases upon the subject.

A promise to pay the debt of a third person is not within the statute, where it is agreed between the parties, the creditor, debtor and promisor, that the debt shall be extinguished and the creditor shall look only to the promisor for payment upon the new promise. In such case no other person remains liable for the debt but the promisor, and his undertaking is not collateral but original to pay his own debt, and not to answer for the debt of another. There is then what is known in the civil law as a delegation, and the creditor, takes a new debtor, who is called the delegated debtor.

In *Anstey v. Marden* (4 Bosanquet & Puller, 124), Chief Justice MANSFIELD says that he did not see "how one person could undertake for the debt of another, when the debt for which he was supposed to undertake was discharged by the very bargain." In *Mallory v. Gillett* (21 N. Y., 412), Chief Judge COMSTOCK, after a very able review of many cases arising under the statute of frauds, gives a classification of the cases not within the statute, and of such cases are these: "When the original debt becomes extinguished, and the creditor has only the new promise to rely upon; for example, when such new undertaking is accepted as a substitute for the original demand." In Throop on the Statute of Frauds, at pages 318, 322, 370, 374, will be found a very able and discriminating review of the cases upon this subject, and the author lays down these rules: "A promise to assume an antecedent liability of a third person is without the statute, if the third person's liability had become extinct at the time



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Opinion of the Commission, per EARL, C.

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when that of the promisor came into existence, or if the third person's antecedent liability to the promisee is discharged in consideration of its assumption by the promisor." And, in this case, it was distinctly agreed between the three parties—the creditor, debtor and promisor—that in consideration that the father of the debtor would pay the promisor \$1,000 in money, and the debtor give him his own notes for the balance, the promisor would pay the claim of the creditor in plated ware, in the months of February and March thereafter, and the creditor should release the debtor. It was obviously contemplated by the parties that all this should be done at the same time. In pursuance of this agreement the promisor executed the written undertaking to the creditor, and either then or soon after, the creditor released the debtor, and the \$1,000 was paid and the debtor's notes given to the promisor, and the notes were subsequently paid. Hence this case is clearly within the rules above stated, and the promise of the defendant is not within the statute of frauds. But if this is not the true theory upon which this case should be disposed of, then there is another theory, equally fatal to the defence of the defendant.

The two instruments dated January 31st, 1861, executed at the same time, relating to the same subject-matter, must be construed together as if they constituted but one instrument; and then, as claimed by the defendant, they show a sale of the plaintiff's demand against Mattison to the defendant in consideration of the plated ware to be delivered to the plaintiff by the defendant. Upon this assumption, the defendant claims that the plaintiff must be defeated, because he has never assigned or offered to assign his demand to the defendant, and has placed it out of his power to do so, as he released Mattison.

According to this construction of the agreement between the parties, the defendant was to deliver the plated ware from time to time during the months of February and March, and as soon as he had delivered the whole of it the plaintiff was to give up to him his demand against Mattison. They

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Opinion of the Commission, per EARL, C.

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were not dependent agreements. Performance on one part was not a condition precedent to performance on the other. The plaintiff was clearly not bound as a condition precedent to assign the claim before the defendant was bound to deliver the plated ware. He was not bound to assign it until after the defendant had fully performed on his part. Hence, this case is fully within the rule laid down in *Morris v. Slite* (1 Denio, 59). In that case the action was in covenant by the vendor for the purchase-money upon a contract for the sale of land. The purchaser was to pay the price of the land in five years from the date, with interest annually, and to pay the taxes on the land, and the vendor covenanted that "after" the purchaser "shall have paid the above sums of principal and interest, at the time and in the manner above specified, and shall have performed the agreement above mentioned," he would sell and convey the land. Chief Justice BRONSON says: "Where it appears, from the terms of the agreement or the nature of the case, that the things to be done were not intended to be concurrent acts, but the performance of one party was to precede that of the other, then he who was to do the first act may be sued, although nothing has been done or offered by the other party. He has not made performance by the other party a condition precedent to his liability, but has trusted to a remedy by action on the agreement.

Here the defendant, after he had performed, could have sued the plaintiff upon his agreement to assign, and could have recovered such damages as he could have proved. And the plaintiff having put it out of his power to assign the claim, the defendant could probably have set up his claim for damages as a counter claim in this action. But what damages has the defendant sustained? What possible good could an assignment do him? The referee has found that Mattison has fully paid to the defendant the whole amount of the claim. And hence, the discharge of the claim by the plaintiff can work no possible harm to the defendant. And the discharge could work no harm, even if Mattison had not paid the defendant, because, before the discharge was executed,

## Statement of case

Mattison became obligated to pay the amount directly to the defendant, and that obligation the plaintiff never, in any way, interfered with or discharged.

Hence, upon the whole case I can see no reason to doubt that the judgment below was fully authorized by the facts of the case, and it should be affirmed, with costs.

All concur.

Judgment affirmed.

WILLIAM W. THORP, Respondent, v. THE KEOKUK COAL  
COMPANY OF THE CITY OF NEW YORK, Appellant.

48	253
113	281
48	253
117	264
48	253
134	127

An admission in an answer that a deed was executed to the defendant is in effect an admission that the deed was signed, sealed and delivered.

The grantee in a simple quitclaim deed, in the absence of fraud or mistake, has no remedy for a failure of title against his grantor, nor has he any defence to an action for the consideration on the ground of failure thereof. Defendant accepted a deed of certain premises containing a clause that it was made subject to a mortgage which the grantee thereby assumed and agreed to pay. The bonds accompanying the mortgage contained a condition that, in case of default, recourse must first be had to the lands mortgaged, and that the obligors would only be answerable for the deficiency.

*Held*, that the mortgagees could maintain an action upon the implied covenant in defendant's deed, without first foreclosing the mortgage, and could recover the whole amount unpaid.

*King v. Whitely* (10 Paige, 465) overruled, and *Trotter v. Hughes* (12 N. Y., 770) explained.

(Argued September 26, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment in favor of the plaintiff entered upon a verdict. (Reported below, 47 Barb., 439.)

Action upon an implied covenant in a deed executed to defendant. The following facts appeared upon the trial:

On the 5th day of July, 1860, Joseph F. Franklin executed and delivered to the plaintiff a mortgage of that date on certain lands in Iowa, to secure the payment of a bond of the same date, which was made and executed by Franklin and his

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Statement of case.

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co-obligors, J. W. Currier, Levi Dodge, N. B. La Bau and N. S. Washburn, conditioned for the payment to the plaintiff of \$4,000 in two years from date, with interest. This bond contained the following clause: "It being expressly understood and agreed, that, in case of default in the payment of interest or principal on the bond, that in such case recourse must be first had to the property described in said mortgage, by foreclosure and sale under said mortgage and bond, and that the above obligors shall only be answerable for any deficiency of the mortgage debt after such foreclosure and sale."

On the 1st day of December, 1860, Franklin executed a deed of the mortgaged premises, purporting to convey them in fee to the defendants. The deed of conveyance contains the following clause: "This conveyance being made subject to a certain mortgage made and executed by Joseph F. Franklin, one of the parties of the first part hereto, to William W. Thorp, for the sum of four thousand dollars, with interest thereon, dated July 5, 1860, and which was acknowledged November 30, 1860, and is ready to be recorded; said mortgage having been given by said Franklin to said Thorp to secure a part of the consideration money arising on a sale and conveyance of the within premises by said Thorp to said Joseph F. Franklin; the payment of which said mortgage, with the interest now accrued and hereafter to accrue, is hereby assumed by the party of the second part hereto."

The bond not having been paid when due, this action was brought against the defendants upon their implied covenant in the deed to pay the mortgage debt. No previous proceedings had been instituted by the plaintiff to foreclose the mortgage.

There was also some evidence as to the delivery of the deed from Franklin to the defendant; and the defendant offered to prove,

1. That the plaintiff had never resorted to his rights under the mortgage, by foreclosure and sale, for the collection of the claim for which this action is brought, and as he is required to do under the provisions of the bond and mortgage.

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Opinion of the Commission, per EARL, C.

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2. That the consideration of the deed from Franklin and wife to defendant has failed.

3. That no consideration passed in the mortgage.

To which offers, on the part of defendant, the plaintiff objected, and the court overruled the same, to which decision of the court defendant excepted.

The court held that there was no question for the jury, and decided, as a matter of law, that the defendant had assumed to pay the mortgage debt, and that the plaintiff could recover the whole of it without first foreclosing the mortgage, and directed the jury to find a verdict for the plaintiff. The defendant took proper exceptions to the rulings of the court. Other facts appear sufficiently in the opinion.

*James Emott* for appellant.

*George W. Stevens* for respondent. Plaintiff is entitled to maintain this action, although the mortgage has not been foreclosed. (*Barker v. Bucklin*, 2 Denio, 46; *Lawrence v. Fox*, 20 N. Y. R., 268; *Burr v. Beers*, 24 id., 178; *Ricard v. Sanderson*, 41 id., 179.) The proviso in the bond was for the sole benefit of the obligors. Defendant is not entitled to the benefit of any proviso, exception or reservation contained therein. (*Hornbeck v. Westbrook*, 9 Johns. Rep., 73, *Burr v. Mills*, 21 Wend., 290; *Schermerhorn v. Talman*, 4 Kern., 98; *Ives v. Van Aiken*, 34 Barb., 566.)

EARL, C. It was claimed, upon the trial and upon the argument in this court, that the plaintiff could not recover, because there was no proof that the deed from Franklin to the defendant was ever delivered to or accepted by the defendant. There is no such defence set up in the answer. On the contrary, it is expressly admitted that Franklin and wife "executed" the deed to the defendant, and this is, in effect, an admission that the deed was signed, sealed and delivered. (Bouvier's Law Dic., "Execution;" *Churchill v. Gardner*, 7 T. R., 506; *Binney v. Plumby*, 5 Verm., 500.)

The court properly overruled the offer of the defendant to show the failure of consideration in the deed from Franklin to the defendant, and also of the mortgage from Franklin to the plaintiff. These offers were quite too general, but we will assume that the defendant offered to prove the failure of consideration set up in his answer, as follows:

"The defendant further says, that the title to the said twenty-two acres, in said complaint and mortgage mentioned and described, has wholly failed and never was in the plaintiff, his grantors, or the New York and Farmington Coal Company, nor could he convey the same, but that the same formed part of the consideration of said bond and mortgage, and that the same is the most valuable part of said real estate, and formed the principal part of said consideration of said bond and mortgage, and that the same has wholly failed."

There were two pieces of land described in the deed and mortgage, one piece of seventy-eight acres and another of twenty-two acres. The deed from Franklin was a quitclaim deed, with covenants only against his own acts. And there is no complaint that these covenants were broken. In such a case, in the absence of fraud or mistake, even if the title to all the lands described should fail, the grantee would be without any remedy against his grantor, or any defence to an action for the consideration, on the ground that it had failed. The grantee in a deed has no remedy, for a failure of title, against his grantor, in the absence of fraud or mistake, except upon the covenants contained in his deed, and if he has no covenants he has no remedy.

This brings us to the only other question in the case, and that is whether the plaintiff could recover without first foreclosing his mortgage. In the deed from Franklin to it, the defendant expressly assumed to pay the plaintiff's mortgage, and this, as it is now well settled, binds the defendant to the same extent as if it had also signed the deed. There has been some diversity of opinion as to the ground upon which the liability of the grantee in a deed in such a case must rest, and it has finally been settled that it may rest upon the doc-

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Opinion of the Commission, per EARL, C.

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trine, that where one person makes a promise to another for the benefit of a third person, the third person may maintain an action upon it. (*Burr v. Beers*, 24 N. Y., 178.) In such a case it is not needful that there should be any consideration passing from the third person. It is sufficient if the promise be made by the promisor upon a sufficient consideration passing between him and his immediate promisee, and when the third person adopts the act of the promisee in obtaining the promise for his benefit, he is brought into privity with the promisor, and he may enforce the promise, as if it were made directly to him. (*Lawrence v. Fox*, 20 N. Y., 268.)

The defendant, for a sufficient consideration passing between it and Franklin, agreed to pay the amount of the mortgage debt to the plaintiff. This the defendant agreed to do personally and absolutely, and not upon the condition that resort should first be had to the land by foreclosure of the mortgage. It matters not that the mortgagor was not liable to pay personally until after foreclosure, and that he was then liable only for the deficiency. It would have made no difference if he had not been liable at all, the defendant having promised, upon a sufficient consideration, to pay the debt. This suit is not primarily upon the bond and mortgage, but upon the promise of the defendant to pay it; and this promise binds the defendant to pay the mortgage debt as it falls due, according to the terms of the bond and mortgage. It was not a conditional or contingent promise, and could not be discharged by payment only of a portion of the debt.

It is claimed by the learned counsel for the appellant that the cases of *Ring v. Whitely* (10 Paige, 465) and *Trotter v. Hughes* (12 N. Y., 74) call for a different conclusion upon this branch of the case. The case of *Ring v. Whitely* was decided before the law was settled that an action at law could be maintained by the third person upon a promise like the one in question. It was manifestly supposed by the chancellor that the mortgagee could enforce this promise only in equity, upon the principle that in equity the creditor is entitled to the benefit of all collateral obligations for the

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Opinion of the Commission, per EARL, C.

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payment of the debt which a person, standing in the situation of a surety for others, has received for his indemnity and to relieve him or his property from liability for such payment; or, in other words, that the undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. In such case the mortgagor stands as the surety and the grantee as the principal for the payment of the debt. And the reasoning of the chancellor seems to have been, that in a case where the mortgagor was not liable for the debt, the relation of principal and surety between him and his grantee could not exist, and hence, that there could be no subrogation in equity, and no ground upon which equity could seize hold of and enforce the promise of the grantee in favor of the mortgagee. But since it has become settled that the promise of the grantee brings him into direct privity with the mortgagee, so that the latter can, at law, sue him upon his promise, I can perceive no reason for invoking the doctrine of equitable subrogation as the sole ground for his liability in equity. So that, now, whether the mortgagor was bound for the debt or not which his grantee has assumed to pay to the mortgagee, I have no doubt that the grantee, contrary to the holding of the chancellor, is a proper party to a foreclosure suit under 2 R. S., 191, section 154.

In the case of *Trotter v. Hughes*, the grantee, Hughes, had not assumed to pay the mortgage. He bought, subject to the mortgage, which it was stated formed the consideration of the deed, and in no way became personally bound to pay the mortgage, and, hence, there was ample ground for defeating the plaintiff's claim against Hughes, without resorting, as Judge Denio in his opinion did, to the doctrine laid down by the chancellor in *King v. Whitely*. But later the learned judge's views underwent some modification; and in *Burr v. Beers* (*supra*) he placed the liability of the grantee, who has assumed the payment of a mortgage, upon the broad ground, that if one person makes a promise to another, for the benefit



of a third person, that third person may maintain an action on the promise.

I have, therefore, reached the conclusion that the judgment must be affirmed with costs.

LEONARD, C. There is but one point raised by the defendant as to which there can be any doubt of the correctness of the judgment appealed from.

It relates to the stipulation in the bond secured by the mortgage which the defendant has assumed to pay, that recourse shall be had to the premises mortgaged, by a foreclosure and sale, before resorting to the liability of the obligors in the bond, and that they shall be liable only for the deficiency. The bond is payable in two years—that is the term of credit on the debt, and prevents an action to foreclose the mortgage, as well as any action at law to collect the bond.

The other stipulation, as to the resort to the personal liability of the obligors, does not prevent an action to foreclose the mortgage. On the contrary, it requires the obligee to pursue the mortgage, and exhaust that remedy first. Thus it appears that the stipulation does not extend or enlarge the term of credit on the debt, but affects the order in which the remedies may be taken to enforce payment.

The liability of the defendant is created by the terms contained in the conveyance of the mortgaged property which the company accepted. The defendant thereby assumed the payment of the mortgage. The term of credit named in the bond bars any action to collect the mortgage, and operates likewise to prevent any action against the company till the expiration of that time, although the terms of the deed to the defendant implies present time.

There is nothing, however, in the contract of the defendant, by which the mortgage is assumed, stipulating for any benefit as to the order in which the holder of the mortgage may take his remedies to obtain payment. Had the defendant claimed any such right, it might have been secured, by assuming the deficiency only to arise after a foreclosure and

## Statement of case.

sale. The contract is different, however. It assumes the whole debt.

The judgment should be affirmed.

All concur.

Judgment affirmed. ✓

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THE CENTRAL BANK OF TROY, Respondent, v. PETER C. HEYDORN, Appellant.

In an action to recover a rent charge reserved by the grantor and covenanted to be paid by the grantee in a conveyance in fee, seizin in the grantor is well established, so far as one holding under the grantee is concerned, by the fact that the grantee entered in allegiance to the grantor's title, out of which the rent is reserved; and, until something is shown to the contrary, the relations created by the covenants in the deed are presumed to have continued. Unless, therefore, some one bound by the covenant to pay rent has paid it, or has been released therefrom, the action is well brought, and the production and proof of the covenant, in the absence of proof of payment or release, entitles the grantor or his assignee to a finding that the rent for twenty years (if the covenant has been so long executed) remains unpaid, and to a judgment therefor. The law presumes payment prior to that time; but no presumption arises, from the absence of proof of such payment, that the rents have been extinguished, and the grantee and assignees released from the covenant. (HUNT, C., dissenting.)

Even proof of nonpayment of rent for a period of sixty-three years would not raise a presumption of such release of sufficient strength to establish the fact conclusively as a proposition of law, when the covenant sued upon remains in the possession of plaintiff, uncanceled, and is produced and read in evidence. *Livingston v. Livingston*, 4 J., Ch. 204, distinguished. (GRAY, C.)

The inclination of the courts is not to go beyond the strict letter of the statute, in presuming from mere lapse of time an extinguishment of a sealed obligation to pay. (GRAY, C.)

(Argued September 26, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial district, affirming a judgment in favor of plaintiff entered upon the report of a referee.

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Statement of case.

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This action was brought in March, 1862, to recover of the defendant rent for certain premises in the county of Rensselaer. The allegations in the complaint were denied, and as a further defence the defendant alleged "that neither the plaintiff, nor his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of this action, nor within twenty years before the alleged cause of action arose;" and, further, "that the alleged covenants and conditions have been released and discharged." On the trial before the referee it appeared that on or about the 30th of July, 1793, Stephen Van Rensselaer, being seized, in fee, of certain lands in Rensselaer county, as party of the first part, and one Frederick Sipperly as party of the second part, mutually made and delivered an indenture, dated that day, by which Van Rensselaer conveyed to Sipperly said land, reserving to Van Rensselaer, his heirs and assigns, the annual rent of fourteen and four-tenths bushels of good clean merchantable winter wheat, which Sipperly, for himself, his heirs and assigns, covenanted to pay; the first payment to be made on the 1st day of January, 1799, and annually on the 1st day of January in each year thereafter forever. On the 25th day of May, 1851, all the rights of Sipperly to a parcel of the premises, which came to him from Van Rensselaer, came to and became vested in the defendant, who from thenceforth held and possessed the same under that title. And on the 7th day of November, 1861, all the rights resulting from Sipperly's covenant to pay rent, including not only the accruing rents, but such arrears of rent as had accrued since the death of Van Rensselaer (the date of that event did not appear), came to and were vested in the plaintiff. The marketable value of the reserved yearly rents which accrued, from May 25th, 1851, to the commencement of this action, upon the parcel of the premises possessed by the defendant, according to the ratio which that parcel bore to the whole premises conveyed to Sipperly, amounted to \$228.60. Upon the conclusion of the evidence the defendant moved for a dismissal of the complaint upon the ground that the

## Statement of case.

evidence did not establish the relation of landlord and tenant. That the plaintiff had failed to prove any title in the premises, and upon the ground that the lapse of time, without any payment of rent, is sufficient evidence that the rent had been discharged or released. The referee overruled the motion and the defendant excepted. The referee then, without further evidence or any evidence that the rent which had accrued prior to that, for the recovery of which this action was brought, had not been paid, found, in addition to the facts heretofore stated, that there was in arrear and unpaid all the rents provided for from the date of the contract, "*there being no evidence of any payments.*" That the relation of landlord and tenant was not created by the contract sued upon, and did not exist between the parties, and as a conclusion of law found and decided that, the plaintiff was entitled to recover of the defendant the sum of \$347.18. The defendant excepted to the finding that Stephen Van Rensselaer was seized of the premises in question when he made and delivered the deed sued upon, and to the finding that the plaintiff was entitled to recover of the defendant. Judgment was entered upon the report of the referee for the amount reported and costs.

*Colvin & Bingham* for the appellant. The lapse of time during which this contract was unheard of was conclusive evidence that the covenants had been released and discharged. (*Giles v. Banmore*, 5 J., Ch. 552; *Jenkins v. Hopkins*, 9 Pick., 543; *Read v. Brookman*, 3 Term R., 158; *Sumner v. Child*, 2 Conn., 610; *Lyon v. Chase*, 51 Barb., 13.) Such deeds operate as assignments and not as leases. (*Van Rensselaer v. Read*, 26 N. Y., 563; *Van Rensselaer v. Dennison*, 35 N. Y., 393, and cases there cited; *Lyons v. Chase*, 51 Barb., 13.) The relation of landlord and tenant cannot be created except by a lease. (*Hope v. Booth*, 1 Barn. & Adolph, 498; *Sackett v. Barnum*, 22 Wend., 605.) A party is not regarded as seized of a rent charge until it is once paid. (Litt., § 217; Co. Litt., 1430.) The vendee holds adversely

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Opinion of the Commission, per GRAY, C.

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to the vendor. (*Osterhout v. Shoemaker*, 3 Hill, 287; *Blight v. Rochester*, 7 Wheat., 547; *Watkins v. Holman*, 16 Peters, 54; *The People v. Van Rensselaer*, 9 N. Y., 343.)

*Samuel Hand* for respondent.

GRAY, C. That Van Rensselaer was seized of the premises out of which the rent accrued was, so far as concerned the defendant, who held under Sipperly, abundantly established by the fact that Sipperly entered thereon in allegiance to Van Rensselaer's title, out of which Van Rensselaer reserved for himself, his heirs and assigns, a perpetual annual rent, which Sipperly, for himself, and for his heirs and assigns, covenanted to pay; and, until something is shown to the contrary, the relation created by the respective covenants between Van Rensselaer and Sipperly, and their respective assigns, is presumed to have continued up to the time this action was commenced; and unless Sipperly, or some one bound by his covenant to pay rent, has paid it, or been released from his covenant to pay, this action was well brought and maintained by the plaintiff, as the assignee of Van Rensselaer, against the defendant, who has succeeded to and holds under his title to Sipperly, notwithstanding the strict relation of landlord and tenant does not exist between them. (*Van Rensselaer v. Hays*, 19 N. Y., 68, 99; *Same v. Read*, 26 id., 558, 580.) Other cases to the same effect might be cited. If this action had been brought to recover rent which had accrued more than twenty years before its commencement, and payment had been pleaded, evidence to repel the presumption of payment arising from lapse of time would have been requisite; but as it was brought to recover rent, every cent of which accrued within twenty years, it was only necessary to produce and prove the covenant to entitle the plaintiff to a finding that the rent for the period claimed remained unpaid, for the reason that, without some evidence of payment of the rent which had accrued within that time, the presumption of non-payment would attach. The burden of establishing that the

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Opinion of the Commission, per GRAY, C.

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covenant sued upon had been released or otherwise extinguished was then cast upon the defendant, who offered no evidence on the subject, nor was evidence given by either party upon any point tending to establish a release of the covenant; but, because none was given, the referee, in the absence of evidence, and against the legitimate presumption that all rents which had accrued more than twenty years prior to the commencement of the action had been paid, did find the fact now relied upon to establish the release of the covenant, viz.: "that there was in arrear and unpaid all the rent provided for from the date of the contract," and why did he so find, not because there was any evidence on the subject, but as he in substance reports, because there was "no evidence of any payments," and now because when the plaintiff established his right to recover the rent sued for, he did not go on and prove that some payments had been made for previous rents (this is the substance of the report), it is insisted that it should be adjudged that not only the rents which had accrued more than twenty years before action brought on it, as well as those sued for and rents yet to become due, had been extinguished, or in other words, that the defendant had been released from his covenant to pay, and hence, because of the strong presumption arising from the plaintiff's omission to prove that some rent had been paid (when no evidence was given to prove that some payments had not been made), the referee erred in his conclusion of law that the plaintiff was entitled to recover, such is in substance the defendant's case, and it is quite enough to say of it that it is wholly unsupported by reason or authority and manifestly unsound. But concede the fact of non-payment to have been squarely found, and that the omission to prove that some rent had been previously paid was sufficient evidence that a payment of rent had never been made from the 1st of January, 1799, when the first annual rent became payable, to the commencement of this action in March, 1863, a space of something over sixty-three years, and that the referee, by finding that fact in effect, found as well in fact as in law that the presumption arising therefrom was not, under

## Opinion of the Commission, per GRAY, C.

the circumstances, of sufficient strength to prove that the defendant had been released from his covenant to pay. The question is therefore presented whether in either conclusion he erred. In considering this question it must be borne in mind that it is no business of ours to determine whether the rent, that has been over due more than twenty years and not sued for, is presumed to have been extinguished, that is, disposed of by statute, but whether the rent which has accrued within that time, as well as the accruing rent to be paid annually forever, had been released. The covenant sued upon was not lost, as the covenant in another case to which I shall presently refer was alleged to be, but was in possession of the plaintiff and produced and read in evidence by him. The question would naturally arise, why, if the defendant had been released, this covenant to pay accruing rents was permitted to remain in the plaintiff's possession uncanceled. The inference drawn by the referee, undoubtedly, was, that notwithstanding no previous payment had been made, the covenant to pay those for which suit was brought, and the accruing rents, had not been extinguished by release or otherwise. If the question thus determined by him was one of fact, we are bound by his conclusion; if, on the contrary, the presumption arising from the non-payment was, under the circumstances, so conclusive in its nature as to deserve judicial sanction as a question exclusively of law, the referee erred; otherwise he did not. To prove that it merits such sanction, we are referred to *Livingston v. Livingston* (4 Johns. Ch. R., 294). That was a case like this, in one respect; the covenant was to pay rent forever. In another it was stronger for the defendant than this; the lapse of time was less. There the time that had elapsed was something over forty-four years; here it was something over sixty-three years. But that case had in it three features which this has not, and which were the main contributions to its distinctive character, as one of law rather than of fact. That was a covenant by a son to his father, the counterpart of which had never come to the knowledge of the executor, who, after the

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Opinion of the Commission, per GRAY, C.

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lapse of forty-four years, filed his bill alleging this fact, and that no rent had ever been paid upon it and asking for a discovery and relief. The absence of the covenant was not accounted for; the idea of its loss lacked verity; and the chancellor, under all the circumstances, presumed that the counterpart, not accounted for, instead of being lost had been surrendered or canceled. That was a case between father and son; the affection of the father for the son would be a natural cause for surrendering to the son his obligation to pay rent. This, with the fact that the covenant never came even to the knowledge of the executor, and that its absence or loss was not accounted for, would require but a slight additional circumstance to satisfy any reasonable mind that it had been surrendered. In this case the covenant was between strangers, without the element of such affection as would induce its surrender. The covenant was not lost, but was produced and read in evidence, and without a single circumstance to create distrust as to its validity, except the mere omission to prove that rent had never been paid upon it, which, at best, was but a slight circumstance; and, when considered in connection with the fact that the plaintiff produced and read the covenant in evidence, it became much less than *prima facie* evidence of a release of the covenant, if not quite insignificant. The inclination of our courts, as indicated by a recent case, is not to go beyond the strict letter of the statute, in presuming an extinguishment of a sealed obligation to pay from mere lapse of time. Our statute provides that, "after the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to have been extinguished." In the case of *Lawrence v. Ball* (14 N. Y., 477), an instrument under seal to sell and convey land on the payment of the purchase-price which the vendee covenanted to pay, and after the lapse of forty-one years after the last payment became due, and thirty-five years after any recognition of the vendee's liability to pay, the devisee of the vendor brought ejectment against a party in possession under the vendee who claimed



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Opinion of the Commission, per EARL, C.

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to own the land, on the ground that it had been paid for, and as evidence of payment he relied upon the presumption arising from the lapse of time since the recognition of any liability to pay. But the court held that such presumption applied only to actions brought to enforce the payment of money, and when thus brought the right of action would be presumed to be extinguished. But as the action brought was for the recovery of the possession of the land, for the payment of which the covenant had been given, and not upon the covenant for the recovery of money secured by it, the defendant could not shield himself by the presumption that the party who sued for the land had been paid for it. And thus the court, while denying the plaintiff the right to collect the money presumed to have been paid, permitted him to recover the land presumed to have been paid for, upon the ground that the statute did not relate to actions other than for money. The case is an extreme one, and cited only for the purpose showing the disinclination of the court to extend to a party the benefit of the presumption of the extinguishment of covenants from mere lapse of time, except in cases to which the statute applies. I am unable to discover a reason, founded upon principle or authority, for disturbing the judgment appealed from.

EARL, C. All the questions in this case are fully settled by prior adjudication, except the one that there is no proof of the payment of rent since the date of the lease. The defendant claims that from the absence of such proof it must be presumed that the rent has been released or discharged. I can find no authority to sustain this claim. In *Livingston v. Livingston* (4 Johns., Ch. 294), the bill alleged that *no rent had been paid* since the date of the lease, forty-five years. In *Lyon v. Chase* (51 Barb., 13) it was proved that *no rent had been claimed or paid* for upward of twenty years. But no case has been brought to my attention, and I think none can be found, holding that from this bare fact, that no rent has been shown to have been paid within twenty years or any

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Dissenting opinion, per HUNT, C.

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longer time, the court will presume the rent extinguished or released.

If the lease and occupancy under it are not disputed when the lessor comes into court claiming rent which has fallen due within twenty years, he has nothing more to prove to entitle him to recover. If the lessee claims that the rent has in any way been released, it is matter of defence, and he must prove it; and this he can do by showing a written release, or probably by showing that for a long period of time, not less than twenty years, no rent has been claimed or paid. This great loss of time without the payment of rent, unexplained, may win the presumption that the rent had, in some way, been released. But the court will not indulge in two presumptions; (1) that no rent has been paid, and (2) that the rent has been extinguished. (See also 46 Barb., 439; 3 Hill, 344; 25 Wend., 455; 5 Cowen, 130; 2 Johns. Ch., 287.)

I therefore favor an affirmance of the judgment.

HUNT, C. (dissenting). The present is an action for the recovery of rent upon one of the Van Rensselaer titles, which have been so frequently before this court. The general principles affecting these conveyances are well settled. It has been held that the conditions contained in them, that the grantee should pay rent, and that the grantor or his assignee might bring his action of covenant for the rent, or that he might re-enter upon condition broken by the grantee or his assignee, are valid. (*De Peyster v. Michael*, 6 N. Y., 648; *Van Rensselaer v. Hayes*, 19 N. Y., 68; *The Same v. Ball*, id., 100; *The Same v. Dennison*, 35 id., 393; *Same v. Barringer*, 39 id., 9.)

I purposely omit all discussion of these points, or of the principle by which they are reached. If numerous and pointed decisions of the Court of Appeals can settle anything, it must be held that, in its general character, this action is maintainable. The case, however, presents a point which has never been before this court, and which involves a grave question. The conveyance was made by Stephen Van Rens-

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Dissenting opinion, per HUNT, C.

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selaer to Frederick Sipperly, in 1793, on the 30th day of July. By various assignments, the interest of the grantor has become vested in the plaintiff. The defendant became the owner and possessor of the premises described in the deed in 1851, by devise from his father. His father had been the owner and possessor of them for thirty years before his death. The trial occurring in 1864, it then appeared that, for at least forty-three years, the defendant and his father, whose title he held, had been the undisputed owners and possessors of the premises. It was held and reported by the referee, as a fact in the case, that there was in arrear and unpaid all the rent provided for from the date of the contract. In other words, no rent was ever paid.

The finding of the referee, that there was in arrear and unpaid all the rent provided for from the date of the contract, was based upon the fact that there was no evidence of any payments. This conclusion was justly drawn. A creditor sues upon a note which has matured many years before the trial, and which has upon it no receipt or indorsement. The case needs no further proof. The law thereupon adjudges that there have been no payments, and that the whole amount of the note is unpaid. If the debtor claims that payments have been made, he must give the proper proof to establish his claim. Until such proof is made, the presumption of law is in favor of the creditor. A mortgage, payable in installments, running through a long period of years, is presented in court, unaccompanied by evidence of payments; the law adjudges that no payments have been made. If the defendant here had made actual proof that no payments had ever been made, the case would have stood just as it now does. A presumption unrebutted is equally conclusive with positive proof. This is the universal rule, except where the statute of limitations or its analogy is interposed as a defence. Whether the statutes of repose, and the considerations which govern the courts in the quieting of ancient claims, will permit a recovery, and to what extent, is another question. Although unpaid in fact, the question of recovery or no recovery may depend upon

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Dissenting opinion, per HUNT, C.

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other principles. No rent having ever been paid, the period of non-payment extending to the length of seventy years, there being no evidence of a claim by the grantor or his assignee for its payment, or an acknowledgment of its existence during that period, by the grantee or his assignees, the grantee having been in uninterrupted possession during the term, is the instrument presumed to be extinguished by payment or surrender?

In the General Term of the third district, this question has been twice presented. In *Tyler v. Heidorn* (46 Barb., 439), which was an action to recover possession of the premises, it was held that these facts formed no defence to the action, and that the plaintiff could recover. In *Lyon v. Chase* (51 Barb., 13), which was an action on a covenant for the rent, it was held by the same court that the rent must be presumed to have been paid or the instrument surrendered, and that there could be no recovery.

It is to be observed that there is no evidence or suggestion that either the creditor or debtor resided abroad, or was absent from the country for any part of the time. Stephen Van Rensselaer resided in Albany; Sipperly and the Heydorns upon the premises in question, a few miles distant from Albany. Neither is there evidence of insolvency or inability to pay on the part of any of the grantees. (1 Ph. Ev.; Cow. & Hill's Notes, pp. 566 [678]*n*, 193.)

The books present the question of the presumption of payment or surrender in several different aspects. I do not pause to consider the distinction between the presumption of a surrender and the presumption of a payment. It does not necessarily arise here.

1. As to sealed instruments generally the rule is undoubted that, after the great lapse of time existing in this case, payment will be presumed. So, where a surrender is necessary to affect a defence, so great a passage of time will authorize the presumption that it has been made. This rule applies to mortgages, and to estates held upon conditions, and in actions at law as well as in suits in equity.

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Dissenting opinion, per HUNT, C.

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In *Giles v. Bauemar* (5 John Ch. R., 545-9), Chancellor KENT says that the presumption of payment, founded on lapse of time, does not always proceed on the belief that the thing presumed has actually taken place, but they presume the fact for the purpose and from a principle of quieting the possession. "These presumptions," he says, "are founded in substantial justice and the clearest policy. If a party having knowledge of his rights will sit still, and, without asserting them, permit persons to act as if they did not exist, and to acquire interests and consider themselves as owners of the property, there is no reason why the presumption should not be raised. It is therefore well settled that the presumption that a demand has been satisfied prevails as much in this court as it does at law. Claims the most solemnly established upon the face of them, will be presumed to be satisfied after a certain length of time. Matters of record, a deed and even a private statute, may be presumed to make a good title." In the case before him, which was an action to foreclose a mortgage, he held that the mortgage must be presumed to be paid. There had been a period of forty years in which no interest had been paid or demanded, the mortgagor being regularly in possession. He lays down the general rule as existing both at law and in equity, that a mortgage is not evidence of a subsisting title, if the mortgagee never entered, and there had been no interest paid or demanded for twenty years; that these facts authorize the presumption of payment. He cites numerous English authorities to this effect, and in our own courts the cases of 3 Johns. R., 386; 7 id., 283; and *Jackson v. Wood*, 12 id., 242.

In *Jackson ex dem Martin v. Pratt* (10 John. R., 382), where no possession had been taken under a mortgage, nor any interest paid nor any steps taken to enforce it for nineteen years, it was held not to be a subsisting outstanding title, and that a jury might presume it satisfied.

In *Fox v. Phelps* (20 Wend., 437), an estate was devised to Henry and Isaac Thorne, upon the condition that certain

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Dissenting opinion, per HUNT, C.

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moneys should be paid to their sister Abigail Thorne. In an action of ejectment brought by the grantee of the devisees, it was held that when twenty-nine years had elapsed after the accruing of the cause of action, the performance of the condition would be presumed.

In *Belmont v. O'Brien* (12 N. Y. R., 394), a sale having been made of certain premises in the city of New York, the purchaser refused to complete the purchase, on the ground that the record showed an incumbrance upon the property by two mortgages, one given sixty-six years before the sale and the other eighty-four years before the sale. On reference to a referee, he reported the existence of the mortgages, recorded, and "that no evidence was given before him of the payment of any portion of the principal or interest or of any acknowledgment of indebtedness upon either of said mortgages at any time, whereupon he found and reported that said mortgages had been paid and satisfied." The Court of Appeals held that the presumption of payment attached, and that the mortgages constituted no valid objection to the title.

The English cases are numerous, to the effect that where mortgages have lain dormant for twenty years, the mortgagor being in possession, and no payments having been made, they are presumed to have been paid. (*Stewart v. Nicholls*, 1 Tamlyn, 307; *Trait v. White*, 3 Burns' Ch. Cas., 289; *Christophers v. Sparke*, 2 Jac. & Walk., 223, 234.) Auxiliary circumstances will raise the presumption of payment in a shorter time. (*Sackett v. Sackett*, 7 Wend., 94.)

It is said in 1 Phillips' Ev. (*supra*, 682 marg. n. 193), "All other sealed instruments or specialties are subject to the same doctrine of presumptive payment, satisfaction or performance, according to the nature of the obligation, as a bond, e. g., a single bill (*McDowell v. McCullough*, 17 Serg. & R., 51), a sealed agreement to pay for land (*Jackson v. Hotchkens*, 6 Cow. R., 401), and an obligation to convey land (*Barnett v. Emerson*, 6 Monroe, 607), a sealed lease and the rent due upon it (*Bailey v. Jackson*, 16 John. R., 210), or articles of agreement (*Darke v. Clayton*, Finch, 246;

Dissenting opinion, per HUNT, C.

*Phillips v. Mornan*, 3 Bibb., 105). So on a covenant against incumbrances, accord and satisfaction were presumed twenty years after breach (*Jenkins v. Hopkins*, 9 Pick., 543)."

The same doctrine extends to judgments (1 Phill., same page), and to powers of attorney to confess judgments (*id.*), and to portions charged on real property (*id.*).

2. It is said that this rule does not affect the grantor's title when applied to the case of a lease, with rent reserved, and not paid for many years. It is said that the lease may continue, although the rent may be presumed to have been extinguished by the lapse of time; and that the entry having been made under the lease, the continuance of that relation will be presumed, and that a defence to an action of ejectment brought by the lessor to recover possession, cannot be maintained on the ground of such presumed extinguishment. Of this class is *Failing v. Schenck* (3 Hill, 344), which was an action of ejectment. There a lease for thirty years had been executed by Failing in 1786, reserving a wheat rent. The action was in 1840, by Failing's son, against a grantor of the lessee, to recover possession of the premises. There was no evidence that any rent had ever been paid on the lease. The plaintiff recovered. In delivering the opinion in the Supreme Court, sustaining the judgment, Judge COWEN says, "I am inclined to think that had the question been material the case was a proper one for saying that the rent due on the lease executed by Nicholas Failing must be presumed to have been extinguished; had an action been brought for that, at least the question of extinguishment might have been proper for the jury. But I find no case which holds as a consequence that we are to presume the relation of landlord and tenant broken up, so as to let in an adverse possession during the continuance of the lease. Take it that upon the circumstances you may presume the rent extinguished shortly after the lease was executed, and even suppose a release of all claim for rent. The only result, as it appears to me, is that the lessee is to be deemed as having held for the residue of the term, discharged of the

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Dissenting opinion, per HUNT, C.

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rent; not that the reversion was extinguished also, or that a state of things arose which entitled the landlord to enter, and therefore let in the statute of limitations to run against him by reason of an adverse possession in his tenant, or indeed in any other person. The statute of limitations, quoad the land, does not turn upon the right of the landlord to receive rent, but on his power to enter. \* \* \* The right of possession was outstanding in virtue of the lease, and had ejectment been brought by the heirs of Failing (during its continuance), that, *per se*, would have constituted a bar." To the same effect is *Jackson v. Davis*, 5 Cow. (123-131), where Judge SUTHERLAND says, that lapse of time presumes payment of the rent and of the amount due on mortgages, but not an extinction of the title. This he holds cannot be presumed from mere lapse of time, but must arise from other facts and circumstances.

On the other hand, I find in Phillips' Evidence (1 Ph. Ev., p. 699, marg. n, 193, 29) the following: "It has been strongly intimated, though not directly decided, that delay by a landlord for twenty years to enter for a forfeiture of his tenant's rights by the non-fulfillment of condition, shall, under the statute of limitations, operate as a bar to his right of entry. (See Lord KENYON, Ch. J., and ASHURST, J., in *Doe ex dem Tarrant v. Heiler*, 3 T. R., 172-3.) That long delay would be a powerful argument for a waiver of the right, in connection with other circumstances, and that it would in time be full evidence of a waiver, there can be no doubt. (*Doe ex dem Tarrant v. Heiler*, 3 T. R., 162; *Malone v. Malone*, 1 Ball & Beal., 32, note a.) And a distinct act, or even a declaration, directly incompatible with the idea of insisting upon the forfeiture, done or made after and with knowledge that is incurred, will be adopted as a waiver. (*Milfar v. Baker*, 1 Lev., 26; *Malone v. Malone*, 1 Ball & Beal., 32, note a.)"

It has been decided that the relation existing between the original parties to this instrument was not that of landlord and tenant. The conveyance operated not as a lease, but as an



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Statement of case.

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assignment of the interest of the grantor in the premises. (*Van Rensselaer v. Dennison*, 35 N. Y., 393.) The condition of the parties, in respect to the presumption of payment or of surrender of the claim, would seem to be that of a grantee who held his estate by grant, with conditions.

The present, however, is an action for the recovery of the rent due from the grantee, not an action for the recovery of the possession. The defence that, from the great lapse of time, the rent is presumed to have been paid or the claim extinguished, is good, even if full force is given to the distinction made by Judge COWEN in *Failing v. Schenck*, *supra*. The action is not ejectment; the claim is not that of a tenant against his landlord that the title is gone. The estate is one upon condition, and the presumption of payment attaching from the lapse of time, there can be no recovery in an action demanding payment of the rent.

The judgment should be reversed and a new trial ordered.

All concur for affirmance, except HUNT, C., dissenting.

Judgment affirmed.

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JAMES' W. COOK et al., Appellants, v. MARVIN HOLT,  
Respondent.

The proposition that a bailee cannot deny the title of his bailor does not apply to a case where the bailee has been compelled by action, of which the bailor had notice, to pay for the property to one having the true title.

(Argued September 26, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial district, affirming a judgment in favor of defendant entered upon the report of a referee.

Action for the recovery of personal property. The referee found the following facts:

On the 17th of June, 1856, a written contract was made between George and Isaiah Weaver of the one part, and

## Statement of case.

Russell, Allen & Martin of the other, by which the latter agreed to sell the former certain standing timber, the former to pay twenty-five dollars down, and twenty-five dollars October first, then next, and the remainder for the timber manufactured on or before April first, next; two-thirds of the timber to be cut during the next winter, the balance the winter following; to be paid for April 1st, 1858. The Weavers paid the twenty-five dollars down, and twenty-five dollars October first, and cut and manufactured into timber a large quantity. Forty-two sticks of timber, the subject of this action, they contracted with defendant to convey from De Kalb, where they lay, to Ogdensburgh. Before removal, Russell, Allen & Martin asserted their title to them, notified defendant thereof, and forbid him to remove them. He, however, did remove them to Ogdensburgh. Russell et al. brought suit against defendant and John L. Cook, one of the plaintiffs herein, for conversion, and recovered a judgment against defendant for the value of thirty-two sticks. There was a verdict in the action in favor of Cook. Defendant paid the judgment, and purchased of Russell, Allen & Martin their interest in the timber remaining. After the arrival of the forty-two sticks in Ogdensburgh, plaintiffs purchased them of the Weavers and demanded them of defendant, who notified them of the claim of Russell et al., and of the commencement of the suit against him, and refused to deliver without being indemnified, which plaintiffs refused.

The referee found, as conclusions of law, that the Weavers had no title to the timber, and could convey none to plaintiffs, and that the latter had no title or right of possession; that by the payment of the judgment and the purchase of the interest of Russell et al., defendant acquired title and right of possession, and that defendants were entitled to judgment for return, etc., and judgment was entered accordingly.

*L. Hasbrouck, Jr.*, for the appellants. The bailor cannot dispute the title of his bailee. (*Stonard v. Dunkin*, 2 Camp., 344; *Hannan v. Anderson*, 2 Camp., 243; *Hall v. Griffin*,

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Opinion of the Commission, per GRAY, C.

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id., 246; *Dixon v. Hamond*, 2 B. & A., 310; *Marvin v. Ellwood*, 11 Paige, 366; *Story's Eq.*, § 817; *Vosburgh v. Huntingdon*, 15 Abb., 254; *McGarv v. Adams*, 14 How., 461, 463.)

*Myers & Magone* for respondent.

GRAY, C. The referee has found, upon sufficient evidence, that the Weavers, under whom the plaintiffs claim title to the timber in question, failed to make or tender the payments necessary to divest Russell and others of their title to it. The proposition that a bailee cannot deny the title of his bailor has no application to a case like the one under consideration, in which the bailee has been compelled by action, of which the bailor had notice, to pay for the property to one having the true title. The objection to the question put to the defendant as a witness upon the stand, in regard to what Weaver told him as to where the timber came from, was not well taken. It was not put upon the ground that Weaver had not, when a witness, been asked whether he had told defendant it came from Russell & Allen's land, but upon the general ground that his declarations were not evidence. He had, as a witness, stated that some of it came from Russell & Allen's, and some of it from other lands; and hence it was that his declarations to the defendant, that he got it from Russell & Allen's land, were evidence for the purpose of discrediting his statement that it came from other land as well as the land of Russell & Allen. The evidence was also admissible upon the ground that it was competent to prove these declarations made in the presence of one of the plaintiffs. These were the only questions presented not covered by the findings of the referee, which, as we have said, were warranted by the evidence; his legal conclusions were a necessary consequence. The judgment should be affirmed.

All concur.

Judgment affirmed.

## Statement of case.

48	278
135	5

ALONZO B. VOORHEES, as Receiver, etc., et al., Appellants, v.  
MICHAEL MCGINNIS et al., Respondents.

There are several tests which aid in determining the question whether articles, personal in their nature, have acquired the character of real estate. 1st. Actual annexation, which must be of a permanent character, except in case of those articles which are not themselves annexed, but are deemed to be of the freehold from their use and character. 2d. Adaptability to the use of the freehold. 3d. The intention of the parties at the time of making the annexation. In the case of machinery, the circumstance, that it may or may not be removed from the freehold without great injury to the building containing it or to itself, is not now deemed to be controlling.

One K., being the owner of a saw and grist-mill, for the purpose of supplying steam power to both, in 1850 erected a substantial building, adapted for the purpose, to contain the requisite machinery; he placed therein a steam-engine, boilers, shafting, gearing, etc.; the engine and boilers were placed upon and bolted to solid brick foundations resting upon the ground excavated for the purpose; the brick work being carried up and over the boilers; the shafting and gearing were constructed with especial reference to the place; were adapted to the nature and objects of their employment, and were firmly fastened and bolted to the building, but could be removed without injury to its walls. They were put up without special intent, on the part of K., either of making them part of the freehold or of removing them at a future time. K. borrowed the money to make the improvements, giving a mortgage upon the property. In 1860 the old boilers were taken out and replaced by new ones; while the new boilers were at the shop in process of construction, and a large portion of the engine there being repaired, K. gave a chattel mortgage upon them to defendant W., and after the repairs were completed and the machinery in running order, gave another upon them and the other machinery to defendant McG. After the repairs and before the last chattel mortgage he gave another real estate mortgage upon the premises; plaintiff acquired title upon foreclosure and sale under the two real estate mortgages. Defendants subsequently removed the machinery covered by their mortgages. In an action to recover possession,—*Held* (GRAY, C., dissenting), that although K. had no special intent, the facts disclosed that the boilers, engine, shafting and gearing were intended to be a permanent accession to the freehold; that the execution of the first chattel mortgage was not sufficient to overthrow this presumption and raise the contrary one, of an intent to preserve their personal character; that therefore they became and were a part of the freehold, and passed to the plaintiff upon his purchase. The remedy of the mort-

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Statement of case.

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gages is against those who wrongfully converted the personal into real property.

(Argued September 26, 1871 ; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial district, affirming a judgment in favor of defendants, entered upon the report of a referee.

The action was brought to recover possession of a steam-engine, boilers, gearing, shafting, planing machines, saw benches, turning lathe, etc., alleged to have been wrongfully severed from the freehold and removed by defendants from certain buildings in the town of Coeymans, called the Kimmey mills.

Plaintiff Callanan claimed to be the general owner, deriving title through the foreclosure of two mortgages, both executed by Philip Kimmey, covering the premises upon which said mills were situated.

Prior to 1850, Kimmey had erected upon the premises a grist-mill and a saw-mill, situate upon the opposite sides of a small stream, and propelled by water therefrom ; desiring to enlarge his business and wanting more power, he concluded to erect a building for a steam-engine and the requisite machinery, shafting, gearing, etc.

He borrowed \$6,000 for the purpose of J. J. Callanan, and, to secure the same, executed his bond and a mortgage upon the premises, dated April 5th, 1850 ; a strong and durable building was erected, well adapted for the purpose, with a stack of chimneys built into the wall, into which the flue of the boilers was fastened ; said boilers and the engine and shafting and gearing and other machinery were placed in and attached to the building, in the manner stated in the opinion of HUNT, C., and with the intention of being used therein. In the winter of 1860, the old boilers having become worn out, Kimmey made an arrangement with defendant, McGinnis, to make new boilers, taking the old ones in part payment. In April, 1861, while the new boilers were being built and were in the shop of McGinnis

## Statement of case.

in Albany, where were also portions of the engine being repaired, Kimmey executed to defendant Westcott a chattel mortgage upon the boilers, engine and one planing machine, to secure \$2,000. The new boilers were put into the building.

In July, 1861, Kimmey executed another real estate mortgage, covering the mill premises to plaintiff, James Callanan, for \$1,452; and in October, 1861, he executed a chattel mortgage to McGinnis, to secure a balance upon his account, covering the property mentioned in Westcott's mortgage, and also the shafting, gearing and various pieces of machinery in the two mills.

The two real estate mortgages were foreclosed, and upon the sale the premises were purchased by plaintiff Callanan, who afterward commenced an action against Kimmey and others to get possession, in which action plaintiff Alonzo B. Voorhees was appointed receiver of all the property, fixtures and machinery, and as such took possession thereof. In December, 1862, the defendants, with men and teams, went to the mills, took out and carried away the property covered by their mortgages.

The referee found, as matter of law, that the articles of property covered by the chattel mortgages were not bound by the lien of the real estate mortgages as against the claims of defendants, and that the latter were entitled to the possession thereof.

*Lyman Tremain* for appellants. The engine and boilers were fixtures, and became part of the freehold. (*Snediker v. Waring*, 12 N. Y., 171; *Winslow v. M. Ins. Co.*, 4 Metc., 306; *Ford v. Cobb*, 20 N. Y., 344; *Richardson v. Copeland*, 6 Gray, 536; *Miller v. Plumb*, 3 Cow., 665; *Union Bank v. Emerson*, 15 Mass., 159; *Ives v. Oglesby*, 7 Watt, 106; 17 Sergt. & R., 413; 3 Watt, 140; 6 Greenl., 154; 11 N. Y., 123; *Walker v. Sherman*, 20 Wend., 655; *Snediker v. Waring*, 12 N. Y., 170; *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb., 484; Am. Law Reg., 321;

## Statement of case.

*Potter v. Cromwell*, 40 N. Y., 292; *Tabor v. Robbins*, 36 Barb., 483.) The old rule has only been relaxed as between landlord and tenant. (6 Cow., 655.) As between mortgagor and mortgagee the same rule applies as between grantor and grantee, and erections made after the mortgage are covered by it. (*Union Bank v. Emerson*, 15 Mass., 159; *Winslow v. Ins. Co.*, 4 Metc., 306; 1 Hill on Mort., 294, note; *Snediker v. Waring*, 12 N. Y., 170; *Robinson v. Preswick*, 3 Edw., 246; *Breeze v. Bange*, 2 E. D. Smith, 474; *Butler v. Page*, 7 Metc., 40; *Gardner v. Grindley*, 19 Barb., 317; *Day v. Perkins*, 2 Sand. Ch., 359; *Shepard v. Philbrick*, 2 Den., 174; *Gillet v. Balcom*, 6 Barb., 370.) The fact that they were embraced in the chattel mortgages, without the consent of the mortgagee, does not change their character. *Leland v. Gasset*, 2 Wash. Dig. Vt. R., 235-6; 17 id., 403; *Preston v. Briggs*, 16 id., 124; *Van Ness v. Packard*, 2 Pet., 137; *Walmesly v. Milne*, 6 Jur. N. S., 125; 7 O. B., N. S., 115; 5 Am. Law Reg., 328; 4 Metc., 310.) If the corpus of the machinery is a fixture, all that belongs to it, although detached, will pass as real estate. (12 Cl. & Fin., 312; 5 Am. Law Reg., 324; 2 Kay & John., 536; *The Met. Soc. v. Brown*, 26 Beav., 454; 25 Penn., 271.)

*John H. Reynolds* for respondents. The rights of defendants are not affected by the fact of the receiver having possession, the question would be one of contempt merely. (*Chautauqua Co. Bank v. Risly*, 19 N. Y., 370, 376.) The defendants were entitled to the property under their chattel mortgages. (*Murdock v. Gifford*, 18 N. Y., 28; *Vanderpool v. Allen*, 10 Barb., 157; *Walker v. Sherman*, 20 Wend., 636; *Godard v. Gould*, 14 Barb., 662; *Swift v. Thompson*, 9 Conn., 63-6; *Gale v. Ward*, 14 Mass., 352; *Stevens v. R. R. Co.*, 31 Barb., 590; 3 R. S., 5th ed., 169, § 6, sub. 4; *Farrar v. Chanflettle*, 5 Den., 527-31.) The artificial power did not belong to the inheritance. (Cases above cited, and 5 Den., 527, 530.)

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Opinion of the Commission, per HUNT, C.

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HUNT, C. The plaintiffs claim that the property in question forms a part of the realty. They are the owners of the realty by purchase, and hence insist that the articles belong to them. The title of the defendants is based upon the claim that the articles are or were to be deemed of a personal character. They are the holders and owners, under chattel mortgages, executed by the former owner, Philip Kimmey. The referee and the General Term of the third district held that the property was of a personal character, and gave judgment for the defendants.

There are several tests, in the form of general principles, that will aid in the determination of the present question.

1. The rule is quite uniform that to give to articles, personal in their nature, the character of real estate, the annexation must be of a permanent character. There are exceptions to this rule, in those articles which are not themselves annexed but are deemed to be of the freehold from their use and character, such as mill stones, fences, statuary and the like. (*Potter v. Cromwell*, 40 N. Y. R., 287; *Capen v. Peckham*, 35 Conn. R., 88.)

2. A second test, but not so certain in its character, is that of adaptability to the use of the freehold. (*Voorhis v. Freeman*, 2 Watts & S., 116; *Pyle v. Pennock*, id., 390.)

3. A third test is that of the intention of the parties at the time of making the annexation. (*Potter v. Cromwell*, *supra*; *Murdock v. Gifford*, 18 N. Y., 28; *Winslow v. Merchants' Ins. Co.*, 4 Metc., 306; *Swift v. Thompson*, 9 Conn. R., 63; *Capen v. Peckham*, 35 Conn. R., 88.)

The circumstance that the machinery may or may not be removed without great injury to building or to itself, is not now deemed to be controlling. In *Potter v. Cromwell* (*supra*) the tests are declared to be, first, actual annexation; second, the use or purpose of the application of the machinery; third, the intention to make the annexation a permanent accretion to the freehold.

In Washburn on Real Property (vol. 1, p. 7), the rule is thus laid down, as between vendor and vendee, and mortgagor



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Opinion of the Commission, per HUNT, C.

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and mortgagee: "If the owner of lands provides anything of a permanent nature, fitted for and actually applied to use upon the premises by annexing the same, it becomes a part of the realty, though it might be removed without injury to the premises." The cases cited in support of this proposition show, also, that the same rule applies, whether the article in question be annexed to the premises before or after making the mortgage. Upon the page following (8) he adds: "It may be stated that whether a thing which may be a fixture becomes a part of the realty by annexing it, depends, as a general proposition, upon the intention with which it is done. Between vendor and vendee, or mortgagor and mortgagee, it has been held that gas fixtures, including a gasometer and apparatus for generating gas, would pass with the house in which they were in use, but not between tenant and landlord, if put in by the tenant. Steam boilers and engines used in a marble mill, and supplying the power by which it is carried, pass as a part of the realty, by a mortgage of the estate by the owner. But the saw frames in such mill were held to be personal chattels. If a steam-engine, for instance, be placed in a shop or factory, to create the moving power by which it is carried on, the engine and shafting necessary to communicate the motive power to the machinery would be as much a part of the realty as a water-wheel, and would pass with the realty by deed or mortgage. The shelves, drawers and counter tables, fitted in a store, pass with the store as realty, \* \* and things which may be fixtures often become so, or otherwise, from the circumstance that they have been actually fitted for and applied to the realty."

KENT says (vol. 2, p. 343, *et seq.*): "There are many chattels, which, though they be of a movable nature, not being necessarily attached to the freehold and contributing to its value and enjoyment, go along with it in the same path of descent or alienation. \* \* \* The law of fixtures is in derogation of the original rule of the common law, which subjected everything affixed to the freehold to the law governing the freehold, and it has grown up into a system of judicial legis-

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Opinion of the Commission, per HUNT, C.

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lation, so as almost to render the right of removal of fixtures a general rule, instead of being an exception. \* \* \* The character of the property, whether real or personal, in respect to fixtures, is governed very much by the intention of the owner and the purposes to which the erection was to be applied." He farther says: "Questions respecting the right to what are ordinarily called fixtures, or articles of personal property affixed to the freehold, principally arise between these classes of persons. 1st. Between heir and executor, and there the rule obtains with the utmost rigor in favor of the inheritance, and against the right to consider as a personal chattel anything which has been affixed to the freehold." The same rule, he declares, obtains between vendor and vendee, or between mortgagor and mortgagee.

The Revised Statutes of this State (2 R. S., 82, § 6, sub. 4) probably intended to put the executor upon the same footing with the tenant, and to give to him, in preference to the heir, such articles as a tenant might hold against his landlord. The effect of this provision is discussed by Chancellor WALWORTH in *House v. House* (10 Paige R., 158). It cannot, however, alter the law as to the relation of vendor and vendee, whatever may be its effect as between heir and executor. As to the former, still the law remains, as Kent declares it to be, in its utmost rigor, in favor of the inheritance.

The law upon this subject has been so recently reviewed in the Court of Appeals of this State, in the case of *Potter v. Cromwell* (*supra*), that it would hardly be justifiable now to go over the cases in detail. It certainly is not necessary. The English cases go much further than our own in the direction of the principles already laid down. I cite a few of the more recent ones. (*Walmsley v. Milne*, 7 C. B., N. S., 115; *Cullwick v. Swindell*, 3 Law R. Eq., 249, Dec., 1866; *Boyd v. Shorrock*, 5 Law R. Eq., 72; *Olmie v. Wood*, 3 Law R. Exch., 257; 4 *id.*, 828, on appeal.) The referee finds specially that said boilers and the steam engine were erected in a building put up for the purpose of containing and using the same or other like machinery therein, and were placed upon solid brick

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Opinion of the Commission, per HUNT, C.

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foundations resting upon the ground, excavated for the purpose. The said foundations were laid in mortar and built in a permanent and substantial manner, and the engine and boilers were bolted into such foundations. That a stack of brick chimney, 100 feet high, was built as part of the building aforesaid for the use of the boilers or such other boilers as might be placed there, and was used for such boiler fires. That said boilers were of several tons weight; and the engine, with its iron bed plate, was also of several tons weight. That the brick-work of the foundation for the boilers was carried up and laid over the body of the boilers; but the bricks which covered the top of the boilers were not so laid as to be able to sustain themselves in position without the support of the boilers. The engine and boilers were, notwithstanding, capable of being removed without injury to the walls of the building, and without injury to the foundations on which they were laid, except that the removal of the boilers necessarily involved the displacement of the bricks covering the top of them. That the shafting and gearing, embraced in the schedule, was all fitted to the special use of transmitting power from the engine to the particular machines which were employed in the building, and was, in length and adjustment, adapted to the building where it was used, and was not of value, except as old material, in any other place, unless such other place, in its local arrangements, was nearly the same as the said mills. That it was all constructed with special reference to the place in which it was to be set up, and was there firmly fastened and bolted in the beams and timber of the building, but was, nevertheless, capable of being removed without injury to the walls of the building by the removal of bolts, screws and similar fastenings. That said boilers, engine, shafting and gearing were erected in as permanent and substantial a manner as is usual, and as is adapted to the nature and objects of their employment, and without any special intent, on the part of the said Kimmey, who put them up, as to making them a part of the freehold,

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Opinion of the Commission, per HUNT, C.

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and without any intention as to removing them at any future time.

In relation to the engine and boilers, shafting and gearing, it would seem to be clear that they were actually and permanently annexed to the freehold, adapted to use in that position, and intended to be a permanent accession to the freehold. Kimmey, who was the owner and erected them, had no intention of removing them at any future time. That he had no special intent to make them a part of the freehold is in harmony with general experience. A man who builds a mill or a house for his own use and occupation, with everything useful and convenient for the purpose, seldom has any special intent that the creation shall be a part of the freehold, or that its auxiliaries shall constitute a part of the freehold. He builds as he wishes, having no reflection as to the legal character of the structure, thinking nothing, and generally knowing nothing, and therefore having no special intent on the subject.

It is further found that the planing machine, fire pump, saw benches and saws were worked by bands and other modes of transmitting motion from the engine, through the gearing and shafting above mentioned, and were complete in themselves as machines, as were also the copper pipes for steaming hubs, and were of equal use and value wherever they were wanted, and were affixed to the building only for convenience in using, and were capable of removal without injury to the building or to themselves.

There is greater doubt whether these articles come within the rule which would make them fixtures. They are less permanent in their character; the actual annexation is much slighter, and their use evinces less evidence of an intended accession to the freehold. They may well be held to be chattels and to pass under the chattel mortgages.

I am of the opinion that upon general principles, that is unless there be some specific agreement to the contrary, or some circumstances controlling the general rule, that the boilers and engines, shafting and gearing, became a part of

Dissenting opinion, per GRAY, C.

the realty, and passed to the plaintiff upon his purchase. It is said that the execution by Kimmey of a chattel mortgage upon it, before it was placed in the mill, would be sufficient to preserve its personal character. Although unknown to the plaintiff, this fact existed in the case. It comes to this: A man employs a carpenter and mason to build a brick house for him upon his lot, and pays them in full the price agreed upon. The mason puts his brick in the walls. The carpenter places his joists and timbers in the proper places in the house. The house is finished and is occupied by the owner. It then appears that the maker of the brick held a chattel mortgage upon them, executed by the mason, and that the sawyer of the timber held a chattel mortgage upon it, executed by the carpenter. Are these articles, now a part of the house, still held upon the chattel mortgages, so that the creditors can despoil the house to obtain their possession, or compel the owner to pay their value? I take it they are not. Their character as personal property is ended. They have become a part of the house; they are real estate; will pass under a deed of the land; may be subjected by a mortgage of the land, or may be held by the owner of the house. (*Fryatt v. Sullivan Co.*, 5 Hill., 116; *Pierce v. Goddard*, 22 Pick. R., 559; 1 Wash Real Prop., pp. 5, 6.) "The remedy of the party is against those who wrongfully converted the personal into real property." (BRONSON, J., in *Fryatt v. Sullivan Co.*) The remark of DANIELS, J., in *Potter v. Cromwell*, that this fact would alter the character of the property, was not well advised, and cannot be sustained upon authority.

Judgment should be reversed and new trial ordered, costs to abide the event.

GRAY, C., (dissenting). The law of fixtures has undergone many modifications; everything annexed to the freehold was at one time governed by the law of the freehold; but as Kent, in his Commentaries, has it, the law has undergone a system of judicial legislation so as almost to render the right of removal of fixtures a general rule instead of an exception.

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Dissenting opinion, per GRAY, C.

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(2 Kent, 11th ed., 420.) The rule was most liberal when applied between tenant and landlord (1 Washburne on Real Property, 18.) It was and remained, with all the modifications claimed for it, especially harsh in its application to the owner of personal property converted by a wrong-doer, and so brought into realty as to become a part of it, by changing its nature from personal to real, and leaving the owner no redress except against the wrong-doer (who may be a pauper) for its conversion. (Gibbons on Fixtures 13 Law. Lib., 13, 2, p. 4.) It was then in the light of the law, as established by what Kent termed a system of judicial legislation, declared by an act of our legislature that "things annexed to the freehold or to any building *for the purpose of trade and manufacture*, and not fixed into the wall of the house so as to be essential to its support, should be deemed assets and go to the executor." (3 R. S., 5th ed., 169, § 6, sub. 4.) Prior to this enactment, the law, in regard to fixtures, as between heir and executor and mortgagor and mortgagee, or vendor and vendee, was regarded as identical. This act, as was observed in *Murdoch v. Gifford* (18 N. Y., 28-32), "should be regarded as furnishing very clear proofs that in the legislative mind that kind of property is considered as not being in any sense included in lands, tenements and hereditaments;" and, as the reporter has it, "may be regarded as a general rule for all cases and parties." If this act had been interpreted to mean what its language obviously imports, this controversy as well as others which have preceeded it would probably not have arisen; but it has not, and the result is that decisions have been made so at variance with each other as to be quite irreconcilable. In *House v. House* (10 Paige, 158, 163), which was a case between heir and executor, the chancellor, who manifestly did not concur in what the legislature deemed the part of wisdom in the passage of the act referred to, said it was "impossible to define, in a short sentence of three lines, what was to be a part of the freehold itself, and what were mere fixtures or things annexed to the freehold for the purpose of trade or manufacture;" and,

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Dissenting opinion, per GRAY, C.

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therefore, held it to be his duty to go back to the common law to ascertain what was a substantial part of the freehold, and what a mere fixture annexed to the freehold, and what is considered a part of a building, and what, in its nature, is mere personal property, and only annexed to such building temporarily for the purpose of trade or manufacture. There is scarcely to be found a rule more perspicuous in its language and less difficult in its application than that prescribed in the act. There certainly can be no difficulty in determining whether things annexed to the freehold or to any building are or are not for the purpose of trade or manufacture; no legal interpretation was ever given to the language employed at variance with its ordinary import; and what less simple rule for determining whether the character of the things annexed for that purpose are changed from personal to real, than by ascertaining whether they are so fixed into the wall of a house as to be necessary for its support. It may not be the best rule, but it is difficult if not impossible to frame one more lucid and easy of application. In *Fryatt v. The Sullivan Company* (5 Hill, 116, 117), the property wrongfully converted was so firmly affixed to the freehold that it could not be removed without destroying the building in which it was placed; and it was held that no action could be maintained for the property against the owners of the building, who were innocent purchasers under a mortgage upon the freehold. In *Murdock v. Gifford* (18 N. Y., 28, 32), the learned judge who delivered the opinion of the court regarded the observations of the chancellor, in *House v. House*, as just, and remarked that it was quite obvious that the statute did not mean that the executor should take everything not essential to the support of the walls of a building. This remark may be just, when limited to the walls only. The statute is not thus restricted in its expression; the exception is not limited to things so fixed into the walls of a house as to be essential to the support of the mere walls, but to the support of the house itself. In a subsequent case (*Ford v. Cobb*, 20 N. Y., 344, 348, 349), the observations of the

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Dissenting opinion, per GRAY, C.

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learned judge who delivered the opinion in *Murdock v. Gifford*, as well as those of the chancellor in *House v. House*, were the subject of comment. Those of the former were held not to be necessary to the decision of the case in which they were made, and those of the chancellor were not regarded as satisfactory; but, inasmuch as the judgment in the case of *House v. House* had become a rule of property, and the case of *Ford v. Cobb*, then under consideration, could be satisfactorily disposed of upon other grounds, the rule held by the chancellor should not then, or without great consideration, be disturbed. In a still later case (*Potter v. Cromwell*, 40 N. Y., 287, 291, 292), which was an action between the purchaser of real estate, upon which was a frame building containing a portable grist-mill, and a receiver appointed at the instance of a judgment creditor, for the recovery of the value of the mill, it was, as I understand the case, found as a fact that the mill was taken out of the building by taking the mill apart, and without injuring it or the building. It was further found that when the judgment debtor put the mill in the building he fastened it firmly and securely to it, and designed it as a permanent structure for use as a custom mill, and to make it a permanent accession to the freehold. In this case the statute was not referred to. The case of *House v. House* was cited as authority, and the court held that, notwithstanding the mill was not fixed into the wall of the house so as to be essential to its support (for it was moved without injury to either), yet, because it was designed as a permanent structure and as an accession to the freehold, it became thereby a part of it; and thus the rule stated by the chancellor in *House v. House* has not only been acquiesced in, but after the lapse of more than a quarter of a century has been reasserted and established as a rule upon property, and ought not therefore to be now disturbed. The referee has found, as facts in the case, that the property in question was annexed to the freehold or building for the purpose of trade and manufacture, and not so fixed into the wall of any building or house as to be essential to its support, and that it



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Dissenting opinion, per GRAY, C.

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was capable of being removed without injury to the walls of the building; when this can be done there is another mode of determining whether its character has been changed from personal to real; and that is by ascertaining the intention with which the owner annexed it. (*Hill v. Sewald*, 53 Pa., 271, 274, 275; *Capen v. Peckam*, 35 Conn., 88, 94; *Crippen v. Morrison*, 13 Michigan, 35; *Teaff v. Hewitt*, 1 McCook, Ohio Rep., 511, 529, 530.) And in Vermont, in order to change property from personal to real by annexing it to the freehold, the intention to do so must be affirmatively established. (*Hill v. Wentworth* 28 Vt., 248.) In *Potter v. Cromwell* (40 N. Y., 287), that fact was held to have been established within the stringent rule mentioned in Vermont (id., 297.) A portion of the property in controversy, viz., one planing machine, the steam-engine and fixtures, were, before they became in any manner attached to the realty, incumbered by the chattel mortgage to Westcott, and thus, within the rule in *Ford v. Cobb* (20 N. Y., 344), their character as personal property was preserved. The removal of the boilers required the displacement of the brick that covered them, as did the removal of the kettles, in *Ford v. Cobb*, involve the displacement of certain bricks of which the arch was composed; but inasmuch as it did not require any serious damage to the freehold to which they were attached, the attachment did not destroy the lien of the mortgage that incumbered them before the attachment was made. The other planing machine, as well as the saw benches and saws, were, like the looms in *Murdock v. Gifford*, complete in themselves, as were also the copper pipes for steaming hubs were of equal value whenever wanted, and affixed to the building only for the convenience in using, and capable of removal without injury to themselves, and hence, within case of *Murdock v. Gifford* (18 N. Y., 28), were personal. I do not concur in the suggestion of the learned judge in *Potter v. Cromwell* (40 N. Y., 283, 296), that annexation will constitute the article annexed to be a part of the realty where no different intention or purpose is manifested.

## Statement of case.

It was not necessary to the decision of the case, the affirmative fact having been found that a permanent accession to the freehold was intended. (Id., 291, 292 and 297.) The better rule is the Vermont rule (*Hill v. Wentworth, supra*), requiring the intention to render the article a fixture, by the act of annexation, to be made affirmatively to appear; it will do something toward the accomplishment of what the statute intended, and be more just to creditors and those whose personal property has been or may be wrongfully annexed. In this case the referee has found, as a fact, that the boilers, engine, shafting and gearing were annexed without an intent of either making them a part of the freehold or any intention of removing them. The fact that they were annexed for the purpose of trade and manufacture, and were capable of being removed without injury to the building containing them, ought not to constitute the article annexed a part of the freehold, in the absence of a finding that an accession to the freehold was intended.

The judgment should be affirmed.

For reversal, LOTT, Ch. C., HUNT and EARL, CC. For affirmance, GRAY and LEONARD, CC.

Judgment reversed. ✓

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**THE ERIE COUNTY SAVINGS BANK, Respondent, v. HENRY ROOF, Respondent, and WILLIAM C. SHEERWOOD, Appellants, impleaded, etc.**

W. C. S. and M. B. S. were each the owner of premises formerly united, which were subject to a mortgage, of which, upon partition, each had assumed and agreed to pay the one-half. W. C. S. paid his portion; M. B. S. conveyed to R., subject to one-half the mortgage, which R. assumed. R. was ignorant of the fact that W. C. S. had paid more than his proportion of the payments already made, and understood and believed he was assuming but the one-half remaining unpaid, and he was allowed but that deduction from the purchase-price. W. C. S., who was to receive a benefit from the sale, was present at the execution of the conveyance, knew R. was taking it with such understanding and belief, and did not inform him of the real facts. In an action brought

## Statement of case.

to foreclose the mortgage.—*Held*, that the rights and equities of the parties interested in the equity of redemption could properly be litigated and adjusted as between themselves; that W. C. S. was estopped from claiming the exclusive benefits of the payments made by him before R.'s purchase, and that the balance due at the date of the purchase was chargeable equally upon the two parcels of land.

(Argued September 27, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, affirming a judgment in favor of plaintiff entered on the report of a referee.

The action is for the foreclosure of a mortgage made by Franklin K. Sherwood to the plaintiff, in April, 1855, to secure the payment of \$1,200, with interest, on the undivided share of the mortgagor in land situated in Buffalo. The principal contest is between the defendants, Henry Roop and William C. Sherwood, who are the owners of the equity of redemption. These defendants answered the complaint by separate answers, and the other defendants suffered judgment by default.

The defendant Roop claims that his half of the property, which he acquired by deed from Merrill B. Sherwood in March, 1860, is liable for the payment of one-half only of the sum due on the said mortgage on that day, while the defendant William C. Sherwood, by his answer, claims that he has paid one-half of the said mortgage, and that his share of the mortgaged premises should not be sold on the decree of foreclosure until after a sale of the other portion, and then only in case a deficiency shall remain due on the mortgage; that his parcel of land is, in equity, discharged of the lien of the said mortgage; that the savings bank has dealt with him as liable only for the one-half, which he has paid.

The case was referred for hearing and decision, and also to compute the amount due.

The referee reported that there was due on the said mortgage at the date of his report, on the 20th of March, 1866, the sum of \$964.63 of principal, and \$98.19 for interest. That the interest of Franklin K. Sherwood, the mortgagor

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Statement of case.

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in the premises at the execution of the mortgage, was that of an owner in fee of an undivided eight thirty-fifths. That the said Franklin K. Sherwood, in November, 1855, conveyed his said interest to Merrill B. and William C. Sherwood, subject to the said mortgage of \$1,200, which they assumed to pay. That in December, 1859, the several tenants in common conveyed one parcel of the premises described in the said mortgage in severalty to William C. Sherwood, and another parcel to the said Merrill B. Sherwood, each of the conveyances being made expressly subject to the said mortgage, which the said grantees assumed and agreed to pay equally. That in March, 1860, Merrill B. Sherwood conveyed the parcel so conveyed to him to the defendant, Henry Roop, subject to the payment of one-half of the moneys secured to be paid by the said mortgage, which the said Roop assumed to pay. That the consideration of the said conveyance to Roop was \$7,000, to wit, \$3,917 money paid or secured to be paid by Roop to said Merrill B. Sherwood, and the balance by assuming one mortgage of \$2,500 made by George Sherwood, and one-half of the money secured to be paid by the said mortgage in suit. That Roop did not know that William C. Sherwood had paid more than his proportion of the money previously paid on said mortgage. That he then understood and believed that the amount unpaid thereon, which he was assuming to pay, was one-half the whole sum then unpaid, and he did not intend to assume the payment of any part of the money theretofore advanced by William C. Sherwood. That William C. Sherwood was present at the execution of the conveyance from Merrill B. Sherwood to Roop, and knew that he was taking the conveyance upon such understanding and belief, in relation to said mortgage and the amount assumed by him, and did not inform him (although the said William C. was aware of it) that he had advanced more than his proportion of the payments theretofore made, or in any way intimate to him that said premises were legally or equitably subject to the payment of more than one-half of the money then actually unpaid on said mortgage.

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Statement of case.

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The referee found as his conclusions of law that the plaintiff was entitled to the usual judgment of foreclosure and sale, and payment of the amount due, with costs, and the expenses of the sale out of the proceeds, and for judgment against Franklin K., Merrill B. and William C. Sherwood and Henry Roop for any deficiency arising on the sale. That, as between Henry Roop and William C. Sherwood, the premises so conveyed to each of them in severalty are equitably subject to the following proportions of the amount so found due, to wit: those of Henry Roop to the sum of \$633.64, and those of Sherwood to \$429.83. That the premises belonging to each be separately sold to pay such sums respectively, together with one-half the costs and expenses of the action and sale.

The counsel for the defendant Sherwood excepted to the decision. He requested that the referee should find that the whole sum remaining due, with the interest, be charged on the parcel of the mortgaged premises belonging to Henry Roop; or that the parcel of Roop should be first sold, and the action as against Sherwood be dismissed.

The referee refused to hold either of the said propositions, and the counsel for the said Sherwood excepted.

The said William C. Sherwood introduced in evidence the deed from Merrill B. Sherwood to Henry Roop, from which it appeared that the consideration therein named was \$3,917, and that Roop assumed the payment of a mortgage made by George Sherwood, and one-half of the money secured by the mortgage in suit; the amounts of the said mortgages were not mentioned in the deed. The counsel for the defendant Sherwood objected to the admissibility of oral evidence, that the consideration of the said deed was in fact \$7,000, or that the amount of the mortgage made by George Sherwood, mentioned in the deed, was \$2,500 with some interest. The referee overruled the objections, and the said counsel excepted.

The counsel for said William C. Sherwood also objected to the admissibility of evidence tending to prove that Henry

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Statement of case.

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Statement of case.

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The counsel for said William C. Sherwood also objected to the admissibility of evidence tending to prove that Henry

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Statement of case.

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Roop did not know that William C. Sherwood had paid on the mortgage of Franklin K. Sherwood more than his proportion, and that he did not understand or believe that he was assuming any more than half of the sum then due, and that William C. Sherwood did know it, and was present at the execution of the conveyance to Roop, and knew the understanding or belief that Roop had in that respect, and did not intimate that the premises were legally or equitably subject to the payment of any more than one-half of the sum then actually unpaid.

The said objection was on the ground: 1. That it was immaterial and irrelevant, there being no issue on the subject.

2. That the evidence tended to vary the legal effect of the deeds.

3. That these facts did not affect the rights of William C. Sherwood.

The referee overruled the objection, and the said counsel excepted.

It was also deducible from the said report, that the whole sum due on the mortgage in suit, at the time of the conveyance to Roop, for principal and interest, was the sum of \$1,050, and that the payments by Sherwood were equal to one-half of the principal and interest secured by said mortgage.

Judgment was entered for foreclosure and sale, etc., upon the said report.

The defendant Wm. C. Sherwood appealed to the General Term of the said Superior Court, where the judgment was affirmed. The said defendant thereupon appealed to the Court of Appeals.

*Greene & Bryant* for the appellants. Wm. C. Sherwood had the right to pay off his half of the mortgage debt, and when he did so his land was discharged of the lien, although no release was given. (5 Cow., 671; 1 Paige, 181; 26 Wend., 541; 23 Barb., 490; 21 N. Y., 343; 21 id., 556; 18 J., 7; 34 Barb., 612; 11 J., 219.) The bank had notice of his right



Opinion of the Commission, per LEONARD, C.

and were bound to act upon it. (22 Barb., 54; 4 Seld., 271; 4 J. Ch., 425, 450; 4 id., 545.) An extrinsic issue of this kind cannot be raised and litigated in an action for foreclosure. (*Smart v. Bemrel*, 8 Keyes, 241.) The silence of Wm. C. Sherwood did not estop him from asserting his rights. (5 Den., 154; 5 N. Y., 401; 9 Barb., 615; 5 Duer, 507; 28 Me., 525.)

*Geo. Wadsworth* for respondent Roop. The consideration clause of a deed is not within the rule excluding parol evidence to contradict or vary a writing. (*Adams v. Hull*, 2 Denio, 306; *Jackson v. Schoonmaker*, 2 John., 230; *Whitbeck v. Whitbeck*, 9 Cow., 266; *McCrea v. Purmort*, 16 Wend., 460; *Bowen v. Bell*, 20 Johns., 338; and see Cowen & Hill's Notes, p. 1441, note 964, p. 549; *Stackpole v. Robbins*, 47 Barb., 212; *Wheeler v. Billings*, 38 N. Y. R., 263.) Any uncertainty in the construction of any clause in a deed is to be construed in favor of grantee. (*Glover v. Shields*, 32 Barb., 374; *L. I. R. R. v. Conklin*, 32 Barb., 381.) As between defendants, Sherwood and Roop, the equity is to charge the share of each with half. (*Rathbone v. Clark*, 9 Paige, 648; *Jumel v. Jumel*, 7 Paige, 59.) The conduct of Sherwood makes the case one of estoppel *in pais*. (Hill on Mort., 2d ed., vol. 1., pp. 576, 577, note *b*; vol. 2, pp. 137, 467; Broom's Legal Maxims, 219; Leading Cases in Eq., 3d ed., vol. 2, p. 64, side p. 20; 1 Story's Eq. Jur., §§ 385, 387; *Hall v. Fisher*, 9 Barb., 17, and see 4 Kent's Com., side page 261 and notes; *M. and O. Bank v. Hazard*, 30 N. Y., 226.) The question is properly disposed of in this action. (Code, § 274, sub. 1; *Norbury v. Castle*, 4 How., 73; *Bogardus v. Parker*, 7 How., 305; *Renwick v. Maccomb*, 1 Hop. Ch., 277.)

*E. C. Sprague* for respondent, the plaintiff. No modification should be made of the judgment to affect plaintiff's conceded rights. (*Ferguson v. Kimball*, 3 Barb. Ch., 616, 620.)

LEONARD, C. The referee has charged the amount due on the mortgage in suit, at the date of the conveyance from

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Opinion of the Commission, per LEONARD, C.

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Merrill B. Sherwood to the defendant Roop, equally upon the parcels of land owned by Roop and William C. Sherwood. This has been done upon the principle of *estoppel in pais*, or deceit. The case shows, even more plainly than the statement of the referee in his findings of fact, that Roop was acting upon the belief that he and William C. Sherwood were liable for the payment of the said mortgage in equal shares, and that their respective parcels of land were chargeable in the same proportions. Such was not the truth, as between William C. and Merrill B. Sherwood; William C. Sherwood had paid much more of the principle and interest than Merrill B. In fact, the latter had paid nothing on account of principle. William C. Sherwood was entitled to be subrogated to the rights of the savings bank to the extent of such advance, as against Merrill B. Sherwood, at the time of his said conveyance, or to have the sale of the property so managed, in the case of a foreclosure, as to protect his advances on account of the mortgage beyond his equal share or proportion. He was present at the time of the conveyance to Roop. He knew the facts. He would be benefited by having the cash payment of Roop, on account of the purchase price, increased, as the money was to be applied on debts owing by Merrill B., either to him or for which he was liable. He allowed Roop to make his payments under his mistaken and injurious belief as to the facts. He should then have spoken. The principle is too well settled to require the citation of authority, that one cannot stand by in silence when he knows that another is acting upon an erroneous state of facts, and thereafter claim the benefit of the correct state of facts, if such claim will tend to the injury of the other person. Much more is this rule just in a case where, by his silence, he derives an immediate and direct advantage over the injured party. His silence then becomes deceit and fraud. The suppression of the truth, in such a case, has the same effect and is equally culpable with the assertion of a falsehood. The defendant, William C. Sherwood, claims that the issue, not being directly between himself and Roop, as

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Opinion of the Commission, per LEONARD, C.

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plaintiff and defendant, the evidence to prove the estoppel or deceit cannot be proven.

He is not wholly consistent in this objection, inasmuch as by his answer he demands that the court shall so adjust the equities of the parties that his parcel of the premises shall be relieved of the lien of the mortgage, for the reason that he has paid his share of it in full. Courts of equity have long exercised the power of directing, in foreclosure actions, the order in which different parcels of the mortgaged premises shall be sold, arising out of the equities of the different parties interested in the equity of redemption as between themselves. (*Rathbone v. Clark*, 9 Paige, 648; *Jumel v. Jumel*, 7 Paige, 591; *Ferguson v. Kimball*, 3 Barb. Ch. R., 616.) The plaintiff has not executed any release or discharge of any portion of the mortgaged premises. The mortgage is a lien in their favor upon the whole property mortgaged. The fact that William C. Sherwood has paid the plaintiff a sum equal to one-half the amount secured, in the absence of an agreement to that effect, does not have the effect to release or discharge the share or interest belonging to him. In the absence of an express agreement, it is simply a payment on account, and he rightly insists that it is the duty of the court, on a foreclosure of the mortgage, to direct that the portion of the premises belonging to him shall not be sold until the other portions of the security have been exhausted. The principle so invoked would have been applicable to his case, had it not been for other facts proven by Roop, constituting a defence to his claim in that respect.

The objection that the evidence of the consideration paid by Roop for the conveyance from Merrill B. Sherwood, and the proportion paid in cash, or by assuming the mortgages thereon, is not well taken. That evidence was part of the case of Roop in showing the deceit or fraud of William C. Sherwood, which would prevent or estop his claim, that neither he nor his share of the property should be held to be subject to the lien of the mortgage, and also to prove that the share of Roop should be primarily liable, as between

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Statement of case.

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himself and William C. Sherwood, for one-half only of the mortgaged premises. The deed was between Roop and Merrill B. Sherwood, and the objection that it was impeaching or impairing the effect of it was not open to William C. Sherwood.

The judgment should be affirmed with costs to the Savings Bank, and to the respondent Roop, against the appellant and his share of the surplus

All concur.

Judgment affirmed with costs to plaintiff, and respondent Roop to be paid out of appellant's share in the surplus, and, in case of deficiency, by him personally.

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GEORGE B. FERRIS, Appellant, v. CHAUNCEY KILMER,  
Respondent.

One who authorizes another to use his name, in the conducting and carrying on of a business, is liable for the debts incurred in such business, although he has no beneficial interest therein.

Where one sells goods to an agent of a known principal, for use in the business of the principal, the presumption is that he gave credit to the principal, and, to shift the responsibility to the agent, the proof should be satisfactory that the vendor sold upon the credit of the agent alone.

H. K., being insolvent, carried on business in the name of C. K., who had no interest in the profits, but allowed his name to be used as a cover. Plaintiff was aware of the arrangement and the reasons therefor; he sold to H. K. a quantity of butter for the business; the purchase was made in the name of C. K., bill made out in his name, and the butter delivered at the store. *Held*, that C. K. was liable therefor.

(Argued September 27, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 47 Barb., 411.)

This was an action to recover the sum of \$610, for a quantity of butter sold by the plaintiff's assignor in August, 1857. Harvey Kilmer carried on the produce business in New York, under the name of C. Kilmer, which name represented

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Opinion of the Commission, per HUNT, C.

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York, under the name of C. Kilmer, which name represented the defendant. Harvey Kilmer was unable to do business in his own name, and used the name of his brother as a cover, the brother having no interest in the profits to be made in the business. The purchase in question was made in the name of C. Kilmer, and the bills were made out in that name. The butter was purchased by the direction of Harvey K., and delivered at the store where he was doing business under the name of C. Kilmer. Previous sales had been made in the same manner, and the payments made by Harvey, at the store.

The referee reported in favor of the defendant.

*Charles H. Woodbury* for appellant. Defendant, by allowing his name to be used in the business, made himself liable for such goods as should be bought in the business. (See *Throop's Verbal Agreements*, vol. 1, p. 228, *et seq.*; *Chase v. Day*, 17 John., 114; *Flanders v. Crolius*, 1 Duer Rep., 206; *Briggs v. Evans*, 1 E. D. Smith, 192.)

*Francis Kernan* for respondent. To raise a question of fact there should be a specific request to the referee to find and exception to his refusal. (*Grant v. Morse*, 22 N. Y., 323.) The judgment is presumed to be right, unless it appear that a rule of law has been violated after assuming that the facts have been viewed in the most favorable light to sustain the judgment which the testimony will admit of. (*Morse v. Grant*, 22 N. Y., 323-5; *Chubbuck v. Vernon*, 42 N. Y., 432; *Sandford v. Eighth Ave. R. R.*, 23 N. Y., 343; *Carman v. Pultz*, 21 N. Y., 547.) In dealing with plaintiff's assignor, Harvey Kilmer bound only himself. (*Palmer v. Stevens*, 1 Den., 471; *Brown v. Butchers', etc., Bank*, 6 Hill, 443.)

HUNT, C. The General Term have sustained the judgment on the ground that on the sale the credit was exclusively given to Harvey. In delivering the opinion of the court, MULLEN, J., uses this language: "The referee has not

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Opinion of the Commission, per HUNT, C.

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found that credit was given exclusively to Harvey, but such is to be taken to be the intention of the referee, and thus construing the report, I am in favor of affirming the judgment." I am not able to concur in this inference of the intended finding of the referee. The undisputed facts point to a contrary conclusion.

It is proved without question that Harvey Kilmer carried on this business in the name of Chauncey, for the reason that he was himself so much in debt that he could not do business in his own name. Goods were purchased in the name of C. Kilmer for the store, and the sales from the store were made in the name of C. Kilmer. The purchases thus made for the store in the name of C. Kilmer were there paid for. All this was by the express authority of Chauncey. Business in this form had been several times transacted by the plaintiff with this establishment, and on the 27th of August the butter in question was bought in the name of C. Kilmer, and delivered at the store, where business was thus carried on in his name. The report corresponds with this evidence.

Upon this precise state of facts, what would have been the result if a creditor of Harvey had levied on this butter after it had reached the store? If the butter was the property of Chauncey the levy would not have held it. If it was the property of Chauncey it was because he was the purchaser from the plaintiff. If he was the purchaser he is liable for the purchase-price.

That a creditor of Harvey could not seize this butter was decided by this court in September last, in the case of *Smith v. Van Olinda*.\* There the plaintiff Evaline Smith brought an action against the defendant for levying upon a wagon by virtue of a judgment against her relative, James H. Smith. It appeared that James H. carried on the business in the name of Evaline, and that the wagon was built at her shop from materials purchased in her name and upon her credit. On the trial Van Olinda offered to show that Evaline had no interest in the business; that it was the business of James

\* See *ante*, p. 169.

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Opinion of the Commission, per HUNT, C.

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alone, carried on for his sole benefit, and that the name of Evaline operated as a cover merely. This evidence was rejected and the plaintiff recovered. Upon appeal to this court the judgment was affirmed, and the rejection of this evidence held not to be error. This decision established the proposition, that the person furnishing the credit, and in whose name the business is carried on, is the legal owner of the property, although the beneficial interest is in another. Upon this decision Chauncey Kilmer was the purchaser and owner of this property, and the action was well brought against him. James H. in that case and Harvey in this was the agent of the person whose name was used and who furnished the money or credit.

It need not be denied that an owner of goods has the power to sell them to a man he knows to be insolvent, and without security. Until a man reaches the condition of mind which justifies an application for a commission of lunacy, he cannot be restrained from making foolish and imprudent bargains. He may even give away his property at his pleasure. The plaintiff was at liberty to sell his butter without security to Harvey Kilmer, whom he knew to be insolvent, rather than to Chauncey Kilmer, whom he knew to be responsible. I am, however, quite unable to comprehend how the law will adjudge that he has so done, when the butter was purchased in the name of Chauncey, when the bills were made out in the name of Chauncey, when it was delivered at the store of which Chauncey was, by his agent, the occupier; and when the seller knew that the person giving the order for the butter, in the name of Chauncey, was the authorized agent of the latter, and when there is not a single circumstance found showing or tending to show that he actually intended to sell to Harvey. In my opinion, the law does not pronounce a judgment so absurd. The cases of *Palmer v. Stephens* (1 Denio, 471), and *Brown v. Butchers' & Drovers' Bank* (6 Hill, 443), cited to sustain the decision, are quite wide of the present question.

The fact that the plaintiff knew the real situation of the

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Opinion of the Commission, per EARL, C.

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parties strengthens rather than weakens his claim. He knew that Chauncey was the principal and that Harvey was the agent. From the activity of Harvey and the absence and indifference of Chauncey, a stranger might have been deceived into the belief that Harvey was the principal and the owner. Should such an one part with his property, his claim against the real owner would be less prominent than that of one who knew, when he parted with his goods, who was the real purchaser.

Upon the undisputed facts in the case, Chauncey Kilmer was the purchaser of the butter in question, and liable to the purchaser for its price.

The judgment should be reversed and a new trial ordered, costs to abide the event.

EARL, C. In this case, the findings of the referee and the facts show that Harvey Kilmer, being insolvent, was permitted to do business in the name of his brother, the defendant. It is true that Harvey was to have the benefit of the business, but it was all done under cover of the defendant's name, as principal, by him as agent. The defendant must be regarded, for all purposes, as the principal, and liable for all the debts contracted by Harvey as his agent.

This butter was bought by Harvey in the ordinary way, and the plaintiff made out the bill, as he had before done upon similar occasions, against the defendant. The butter was delivered at the store where the business was carried on in the name of the defendant.

I do not see how it can make any difference with the rights of the plaintiff that he knew how the business was carried on, and the purposes for which it was thus carried on in the name of the defendant. He knew that the defendant was the principal in the business, and that Harvey was his agent, and he knew that he could hold, and had the right to hold, the principal for payment. Under such circumstances I see no ground for presuming that he meant to trust the insolvent agent exclusively.



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Statement of case.

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Where one sells goods to an agent of a known principal, the presumption is that he gives credit to the principal and not to the agent; and, to shift the responsibility from the principal to the agent, the proof should be satisfactory that the vendor sold upon the credit of the agent alone.

I am, therefore, of the opinion that the plaintiff was entitled to recover, and the judgment should be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

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THE COMMERCIAL BANK OF ALBANY, Appellant, v. VISSCHER  
TEN EYCK, Respondent.

The cashier of a bank is bound to exercise reasonable skill and ordinary care and diligence in the performance of his duties. If he fails in such skill or omits such care and diligence, and the bank suffers damage in consequence, he is liable.

In the absence of fraud or collusion, he is not liable to the bank for an act done under the direction of its president, the managing officer, under circumstances which do not disclose any absence of due care and diligence upon his part.

The provisions of section 8, of the act in relation to moneyed corporations (1 R. S., p. 591), which provide that no conveyance, etc., of the real estate and effects of such corporation, exceeding \$1,000 in value, shall be made, unauthorized by a previous resolution of the board of directors, do not apply to a sale, by the financial officers of a bank, of mortgages or other securities pledged to secure a loan, made to realize the money secured by the pledge.

Where the transaction is in reality a loan upon sufficient security, if loss is sustained, a cashier is not liable for permitting it to be done in the form of an overdraft.

A cashier forwarded certain securities, belonging to his bank, to responsible brokers for sale, drawing against them for a portion of their value, which draft was accepted and paid. He negligently omitted to inquire after the securities or to collect the balance realized on sale thereof. The brokers, with knowledge that the bank had an interest therein, wrongfully applied such balance upon a claim against a third person. In an action against the cashier (the brokers remaining responsible), held that, as the brokers

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Statement of case.

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were liable to the bank for the balance, it sustained no damage from the cashier's negligence, and he, therefore, was not liable.

(Argued September 27, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial district, affirming a judgment entered upon the report of a referee in favor of the defendant. (Reported below, 50 Barb., 9.)

The action was brought to recover of the defendant damages alleged to have been sustained by the plaintiff, by reason of the neglect or misconduct of the defendant as cashier of the plaintiff's bank. The facts pertinent to the questions discussed appear in the opinion.

The referee decided that plaintiff was not entitled to recover, and directed judgment for defendant, which was entered accordingly.

*John H. Reynolds* for the appellant. It is a violation of duty for a cashier to allow an overdraft, and if a loss is sustained by reason thereof he is liable. (*Bank of St. Mary v. Calder*, 3 Strobhart, S. C., 403; *Miner v. Bank of Alex.*, 1 Peters, 46, 70.) The bank having a technical right of action therefor, it could only be discharged by payment or release under seal. (*McKnight v. Dunlop*, 5 N. Y., 537; 23 Wend., 309; 1 Hill, 486, 488; 5 Hill, 77, 78; 2 Barn. & Cress., 821.) The officers of a bank are the agents of the corporation, and are liable for an abuse of their trust whenever the agents of an individual would be. (*Austin v. Daniels*, 4 Denio, 299; *Angell and Ames on Corp.*, §§ 310, 312, 314; *Story on Agency*, 207 c.) For a neglect or omission of duty by which injury is sustained, a cashier is liable. (*Miner v. Bank of Alex.*, 1 Peters, 70; *Angell and Ames on Corp.*, §§ 412, 414; *Story on Agency*, § 217 c.) Without adopting defendant's act, so as to entitle it to any claim which existed against Seyton & Wainwright, the bank could hold him liable. (*Lawrence v. Fox*, 20 N. Y., 268.) It was not in the power of the president and cashier to assign the Reynolds mortgage without a

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Opinion of the Commission, per EARL, C.

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resolution of the board of directors. (Rev. Stat., 501, § 8; *Gillett v. Phillips*, 14 id., 118; *Highland Bank v. Dubois*, 5 Denio, 558; *Burdick v. Austin*, 21 Barb., 241.) The direction of the president that this security be surrendered, is no defence to defendant, nor does it mitigate his liability. (*Austin v. Daniels*, 6 Denio, 290; *Miner v. Bank of Alex.*, 1 Peters, 70; *Barrington v. Bank of Washington*, 14 Sergt. and Rawle, 299.)

*Lyman Tremain* for the respondent. Defendant was bound only to the exercise of good faith and ordinary care and diligence. (*Lavlor v. Keoquick*, 1 J. C., 174; *Evans v. Potter*, 2 Gall., 13; *Scott v. Depuyster*, 1 Ed. Ch., 513, 534; *Liotard v. Graves*, 3 Caines, 226; 1 Greenlf. Ev., 34.) Defendant was guilty of no improper act in certifying Wilson's check. (*Cartwright v. Wilmerding*, 24 N. Y., 534.) Nor was he so guilty in sending the bonds to Seyton & Wainwright. (*Wheeler v. Newbould*, 16 N. Y., 392.) The bank has lost nothing by this, as the brokers are responsible and are liable. (*Marvin v. Elwood*, 11 Paige, 365; *Bates v. Stanton*, 1 Duer, 79; *Hale v. Boardman*, 27 Barb., 82; *Lawrence v. Fox*, 20 N. Y., 268.) It is a good defence that the act complained of has been followed by no loss. (Story on Agency, § 236; Sedg. on Dam., 32.)

EARL, C. The defendant, as cashier, was a financial agent of the plaintiff, entrusted to some extent with the management of its affairs. As such agent he was bound to exercise reasonable skill and ordinary care and diligence in the discharge of his duties. (Story's Agency, § 182, etc.) If he failed in such skill or omitted such care and diligence, and in consequence thereof the plaintiff suffered damage, he is liable to respond. And much more is he liable to respond if he caused any damage to the plaintiff by any illegal, fraudulent or tortious act

It is not claimed, on the part of the plaintiff, that the defendant was guilty of any fraudulent act, or that he made

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Opinion of the Commission, per EARL, C.

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any personal profit out of the transactions of which the plaintiff complains. But his liability for the damages claimed is sought to be enforced on the ground that he omitted or violated some duty of skill or diligence which he owed to the plaintiff.

For some time previous to June, 1860, Schoolcraft was the president and chief financial officer of the plaintiff, receiving a large salary, and the defendant was his subordinate; and he made to Wilson the loan of \$14,000 January 4, 1860, and took from him the Reynolds mortgage and other collaterals, and delivered Wilson's note and the collaterals to the defendant to be placed by him in the cashier's chest. With this loan the defendant had nothing whatever to do; and as Wilson was a man of high character and undoubted credit, he had no reason to suspect that it was in any way improper. About a month after this loan Schoolcraft informed him that Wilson could permanently "place" Reynolds' mortgage (meaning thereby, doubtless, that Wilson had found a place where he could dispose of the mortgage and realize the money for the same), and directed him to give the same to Wilson that he might thus dispose of it and this the defendant did. In doing so, it is impossible to perceive how he incurred any liability. He acted under the direction of his superior, and the object was, as we must infer, to enable Wilson to raise the money upon the mortgage and pay his loan. There is no proof or finding that there was any improper collusion between Schoolcraft and Wilson; and when we consider that Wilson was supposed to be perfectly responsible and honest, and that the bank had other collateral security to the nominal amount of \$12,500, which was not known to be worth less, the delivery of the mortgage to him, under the circumstances, does not show the absence of that care and diligence which the defendant owed the plaintiff. The whole transaction was not an extraordinary one, and might well have occurred between the vigilant officers of any bank and a person of the standing and position occupied by Wilson.

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Opinion of the Commission, per EARL, C.

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The learned counsel for the appellant claims that, in delivering up this mortgage, the defendant did an illegal act, as he violated the law (1 R. S., 591, § 8) which provides that no conveyance, assignment or transfer of any of the real estate or effects, exceeding in value \$1,000, of a moneyed corporation shall be made, which is not authorized by a previous resolution of the board of directors of such corporation. To this claim there are two answers, both quite satisfactory: First, this mortgage was not, within the meaning of the law, assigned or transferred to Wilson; he was simply entrusted with it, that he might raise the money on it and pay his loan to the bank; second, the bank held the mortgage as pledgee, and it would be an unreasonable construction of this law to hold that in such a case the financial officers of a bank cannot, without a previous resolution of the board of directors, sell the property pledged, whether it be bonds, stocks or mortgages, to realize the money secured by the pledge.

Hence, I can see no reason for holding the defendant liable on account of this loan of \$14,000 or the surrender of the Reynolds mortgage to Wilson, and I will proceed to examine the other and more important claim made against him.

In September, 1860, the State owned \$100,000 of stock, which it had loaned to the Auburn and Rochester Railroad Company, and which was payable January 1, 1861, and it held, as security for such stock, ninety-two New York Central railroad bonds of \$1,000 each, and accrued interest. Wilson was treasurer of the railroad company, and feared, if the State should suddenly place these bonds upon the market, it would depreciate their value. He therefore applied to the defendant for a loan to take up the bonds, and it was arranged that he should draw his check for the amount, \$93,073.33, and that he should go to the comptroller of the State and get the bonds and deposit them with the plaintiff as collateral security for the loan, and that the plaintiff should hold them until they could be gradually disposed of. The check was drawn, payable to the order of the comptroller, and certified by the defendant to be good. Wilson delivered it to the comp-

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Opinion of the Commission, per EARL, C.

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troller, and within one hour thereafter delivered the bonds to the defendant. So far, no harm was done to the bank. It had made the loan, and had ample security for it; and it was an advantageous loan, as the bank was to receive seven per cent, and the check was to be deposited in the bank by the comptroller, the bank paying but four per cent. There seems to have been no want of prudence in this transaction on the part of the defendant. The check was drawn to the order of the comptroller, so that it could not be diverted from the use intended, and the only risk was that Wilson might take the bonds and keep them instead of bringing them to the bank, and this risk, in the case of a man of his character and standing, was no greater than it would have been if any officer or clerk of the bank had been entrusted with them.

While this was in form an overdraft, as Wilson did not, when he drew the check, have the funds in the bank, yet it was really a loan, and the check was taken as a mere voucher to be held by the bank. I do not, however, assent to the claim of the counsel for the appellant, that a cashier, in all cases, becomes personally liable when he permits an overdraft. It is not an uncommon thing for bankers to permit overdrafts, with an understanding that the account should be made good before the close of banking hours on that day, or soon after; and whether such overdrafts are prudent or not depends upon the character and standing of the drawer, and upon the circumstances of each case. Hence, if nothing more had been done as to this loan and these bonds, the plaintiff could not well have complained that the transaction was imprudent, and that the defendant had in any way incurred any liability. Within ten days, ten of these bonds were sold, and the proceeds placed in the bank. In about three months the defendant urged Wilson to close up the loan, and he then gave the defendant a sight draft for \$70,000 on Seyton & Wainwright, brokers, of New York, and directed him to forward the bonds to them to protect the draft. This the defendant did, by express, taking a receipt from the express company.

Wilson informed the brokers by letter, first submitted to the defendant, that the bonds would be thus forwarded, and that they should sell them at par and accrued interest, and that they should hold the proceeds, beyond the \$70,000 subject to the order of the defendant, as cashier. They sold thirty-two of these bonds from time to time up to March 2d, 1861, and on the 20th of April they sold the remaining fifty of the bonds, under the instructions of Wilson, for \$50,000. Wilson died on the 3d day of July, 1861, and never until after his death did the defendant make any inquiries after the bonds or their proceeds.

There certainly was no want of prudence or proper care on the part of the defendant in sending the bonds to the brokers. They were sent through a responsible express company to a responsible firm of brokers that they might be sold, and the money realized to pay the balance of the loan. But the referee found that the defendant was negligent in omitting for so long a time to inquire of Seyton & Wainwright as to the bonds, for the purpose of getting the balance due the bank; and if the bank had suffered any loss from this negligence, it may be that the defendant would have been liable.

But the bank did not suffer any loss from this negligence. The brokers are perfectly responsible, and able now to respond to the bank. The bonds belonged to the bank as pledgee, and they were ordered to sell them and hold the balance of the proceeds, subject to the order of the bank. And they had no right, upon the facts found by the referee, to make any other disposition of this balance. They wrongfully applied it upon their claims against Wilson; but they gave him no new credit, and incurred no new liabilities upon the faith of these bonds, and nothing appears showing that they have any defence whatever to the claim of the bank for this balance. The bank has not even claimed this balance of them. I do not, therefore, perceive how the bank can claim that they have suffered any loss which can be cast upon the defendant. The defendant was guilty of no wrong in sending

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Opinion of the Commission, per EARL, C.

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the bonds to the brokers. The only omission of duty with which he can be charged is in not looking after them and calling for the balance. But this omission caused no damage. The balance due the bank is in the hands of the brokers and can be procured. For this balance the defendant is no more liable than he would have been if there had been an overdue note for the same amount against the brokers, which he had for an unreasonable length of time neglected to collect, the brokers remaining perfectly responsible.

The brokers were notified by Wilson that he had given a draft to Ten Eyck as cashier for \$70,000, and that the bonds would be sent by him to them by express, and that they could sell them and pay the draft, and hold the balance subject to the order of Ten Eyck, plainly meaning Ten Eyck as cashier. The bonds were sent by express in a package marked and sealed as from the bank. Here were facts sufficient at least to put the brokers upon inquiry as to the interest of the bank in the bonds, and the right of the bank to the surplus; and they must be held to have acquired all the knowledge they would have received if they had made the inquiry. Hence they must be held as dealing with this surplus, with full knowledge of the rights of the bank, and I am unable to see how they could claim or dispose of it so as to defeat the claim of the bank.

Having thus given this case the careful consideration which its importance demands, I have reached the conclusion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.



## Statement of case.

JACOB HAPPY, Respondent, v. ALFRED MOSHER et al.,  
Appellants.

48	313
127	212

The provision in the State Constitution, that no person shall be deprived of property, etc., without due process of law (art. 1, § 6), does not require a legal proceeding according to the course of the common law, nor must there be a personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on, and an opportunity offered him to defend. The opportunity to defend must not be colorable and illusory; but it matters not, though it may be difficult, so long as it is not impracticable.

The act of 1863 (chap. 482, Laws of 1863), providing for "the collection of demands against ships and vessels," is not repugnant to the above mentioned provision, as it provides a reasonable notice and gives an opportunity to litigate the lien.

An omission to state in the application to the county judge the time and place of filing the specification of the claim, does not invalidate proceedings under that statute where the vessel has not departed from the port. The giving of the bond required by the act is a waiver of any technical defect in the prior proceedings.

The obligation of the bond can only be discharged by showing that no debt was due or that no lien existed.

Where the person furnishing the lumber accepted the note of the contractor building the vessel for the amount of the claim payable in three months, *held*, that this extended the time of payment in the absence of an agreement that it should not have that effect, and until the note was due proceedings could not be instituted under the act to enforce its collection.

In an action upon a bond given under the provisions of said act, in order to prove that the lumber was used in the construction of the vessel, the plaintiff was permitted to prove, under objection, the declarations and admissions of the contractor and his agent, made after the delivery of all the lumber. *Held*, error; that the contractor was in no sense the agent of the owner, and there was no such relation between them as to make his declarations competent against the latter or his sureties.

(Argued September 27th, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial district, affirming a judgment entered upon a verdict in favor of plaintiff, and affirming an order denying a motion for a new trial. (Reported below, 47 Barb., 501.)

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Statement of case.

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This action is upon a bond given by the defendants, in order to obtain the discharge of a vessel which had been seized under a warrant of attachment, issued by the county judge of Ulster county, to enforce an alleged lien of the plaintiff thereon, according to the provisions of chapter 482, Laws of 1862. The answer contains a general denial and alleges a release of the lien.

One Caler, in March and April, 1864, was engaged at Rondout in building a barge for the defendant Mosher, and one Minerly was his foreman upon the work. During the months of March and April the plaintiff sold to Caler a quantity of chestnut lumber for the price of \$247.64, which he claimed was used in the construction of this vessel; whether or not it was all so used was a controverted question.

After the lumber was delivered, the plaintiff settled with Caler for the same, and took his note. But learning at the Rondout Bank that the note was not drawn right, he returned it to Caler, and had another note drawn; and not finding Caler, so that he could sign this note, he took it home. Afterward, plaintiff's son, who was about to go to Rondout, told his mother to tell his father to leave the note where he could get it. And this was done; and without any direction from his father, the son took the note and got Caler to sign it. The note was for \$368.14; dated May 28, 1864; payable in three months after date, to the order of the plaintiff at the Rondout Bank. The son retained the note two weeks, and then delivered it to his father, the plaintiff. The plaintiff kept the note, and never, down to the day of the trial, offered to return it to Caler.

The plaintiff's attachment proceedings were instituted on the 11th of July, and the bond sued upon, signed by Mosher and two sureties, was executed on the 21st day of July. The bond was conditioned "to pay the amount of any and all claims and demands which shall be established to be due to the said Jacob Happy, and to have been a subsisting lien upon said vessel," pursuant to the act of the legislature above referred to.

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Statement of case.

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At the time these proceedings were instituted the vessel was upon the ways, unfinished. At the close of the plaintiff's evidence, and also at the close of all the evidence, the defendants moved for a nonsuit on the ground "that there was no sufficient evidence that any of the plaintiff's materials went into the vessel; that the taking of the note extended the time of payment to the maturity of the note, and also destroyed the alleged lien." The court denied the motion, and the defendants excepted.

The court charged the jury, among other things, that the plaintiff was entitled to recover for such portion of his lumber as was used in the building of the barge in question. That it was a question of fact for them to determine what amount, if any, of the plaintiff's lumber was used in the vessel, and what was its value. That if Minerly, when he stated to or agreed with the plaintiff that 8,800 feet of the plaintiff's lumber had gone into the boat, was Caler's agent speaking by his authority, they were at liberty to take that statement into consideration in getting at the amount of lumber used in the vessel. That if they found that this was the only vessel being built at Caler's ship yard, it was for them to say whether this lumber or part of it went into this vessel. That if Minerly finished this vessel and put the plaintiff's lumber in it, the defendants are liable in this action. That if the plaintiff took the note in evidence as payment, or as an extension of the time of payment, the plaintiff cannot recover. But if the plaintiff took the note without intending to extend the time of payment, he has not waived his lien, and that fact is not a bar to recovery in this action. To which portions of the charge the counsel for defendants excepted.

The jury rendered a verdict for plaintiff for \$246.40. The counsel for the defendants moved, upon the minutes of the court, to set aside the verdict, and to grant a new trial upon the exceptions and for insufficient evidence, and the court denied the motion. Other facts appear in the opinion.

*S. L. Stebbins* for appellants. The act of 1862 is uncon-

## Statement of case.

stitutional, and the bond therefore void. (*Brookman v. Hamill*, 4 Hand, 554.) The application was insufficient, and the county judge acquired no jurisdiction. This point is available here, although not taken on trial. (*Veltman v. Thompson*, 3 Const., 438; *Palmer v. Lorillard*, 16 Johns., 343, 353, 354; *Beekman v. Frost*, 18 id., 544, 559, 569, 565; *Sandford v. Granger*, 12 Barb., 392, 403; *Caldwell v. Colgate*, 7 Barb., 253; *Brookman v. Hamill*, 4 Hand, 554, 564, 565.) The reception of evidence of the declarations of Minerly was error. *Paige v. Cagwin*, 7 Hill, 361, 369, 379, 380; *Hurd v. West*, 7 Cow. (3d ed.), 752, 759 and note; *Kent v. Walton*, 7 Wend., 257; *Whittaker v. Brown*, 8 Wend., 490; *Bristol v. Dunn*, 12 Wend., 142; *Beach v. Wise*, 1 Hill, 612; *Stark v. Boswell*, 6 Hill, 405; *Christie v. Bishop*, 1 Barb. Ch., 115; *Brisbane v. Pratt*, 4 Denio, 63; *Smith v. Webb*, 1 Barb., 230; *Brown v. Mailler*, 2 Kern., 118; *Westlake v. St. Lawrence Mutual Ins. Co.*, 14 Barb., 206, 213; *Smith v. Schanck*, 18 Barb., 344; *Booth v. Swozey*, 4 Seld., 276; *Tousley v. Barry*, 16 N. Y., 497; *Osborn v. Robbins*, 37 Barb., 481; *Jones v. East Society M. E. Church of Rochester*, 21 Barb., 161; *Cuyler v. McCartney*, 33 Barb., 165; *Schenck v. Warner*, 37 Barb., 258; *Foster v. Beals*, 21 N. Y., 247; *Vrooman v. King*, 36 N. Y., 477; *Earl v. Clute*, 1 Keyes, 36; *Cuyler v. McCartney*, 40 N. Y., 221, 235.)

*Erastus Cooke* for respondent. The lien created by the act of 1862 is valid. (*Sheppard v. Steele*, 43 N. Y., 52; *Brookman v. Hamill*, 43 N. Y., 552; *People's Ferry Co. v. Beers*, 20 How., 393, 402; *Maguire v. Card*, 21 How., 248; *Allen v. Newbery*, 21 How., 245.) There being a valid lien, the county judge had jurisdiction. Technical objections, affecting the regularity of proceedings, cannot be raised for the first time upon appeal. (*Mabbett v. White*, 12 N. Y., 451; *Elwood v. Deifenday*, 5 Barb., 406; *Numan v. Wells*, 17 Wend., 142, 143.) The giving the bond was an admission of the regularity of the proceedings. (*Coleman v. Bean*, 3 Keyes, 94.)

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Opinion of the Commission, per EARL, C.

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Taking a note simply, would not discharge the lien. (*The Nestor*, 1 Sumn., 73 ; *Hill v. Beebe*, 13 N. Y., 557.)

EARL, C. It is claimed that the statute of 1862, by which this lien was created and under which the attachment proceedings were instituted is void, as in conflict with the constitutional provision which provides that no person shall be deprived of his property "without due process of law."

In *Sheppard v. Steele* (43 N. Y., 52), it was held that this statute was not unconstitutional as infringing upon the right of trial by jury. As appears by the opinion of Judge FOLGER, it was claimed on the argument of that case, by the counsel for the appellant, that the statute was also void because it deprived a person of property without due process of law. While this latter constitutional provision was probably not much discussed before the court, and may not have been particularly considered by the court, yet it was involved in the case and was brought to the attention of the court; and hence, I think, we should hold that the case determines that the statute under consideration is not in conflict with either of the constitutional provisions referred to.

If this were an open question, I should without any hesitation reach the same conclusion. An approved definition of due process of law is "law in its regular course of administration through courts of justice." (2 Kent Com., 13.) It need not be a legal proceeding according to the course of the common law; neither must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend. (*In the Matter of the Empire City Bank*, 18 N. Y., 200; *Rockwell v. Nearing*, 35 N. Y., 302.) It matters not that it may be difficult for him to defend under the law, so long as it is not impracticable for him to do so by the use of such reasonable efforts as the owners of property may generally be supposed to be capable of. His opportunity to

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Opinion of the Commission, per EARL, C.

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defend, however, must not be merely colorable and illusory.

This statute provides for notice of the proceeding by publication, under such circumstances that it is reasonably certain that the opposite party would be apprised of the claim made against him. And it provides that the party may, before sale of the property, have the claim and right to the lien litigated by giving the bond required.

It is claimed that the party is deprived of due process of law because he is first required to give a bond before he can defend against the claim. This doubtless presents a practical difficulty in some cases. But in most cases the owner of the property can give the bond, and the cases would be very rare in which he could not do it. Laws must furnish general rules, and are to be judged by their general effects and tendencies, and not by the particular mischief which, under possible circumstances, they may occasion.

Laws in reference to cattle distrained damage feasant, in reference to strays, and to enforce the responsibility of stockholders in banking corporations, under chapter 226, Laws of 1849, are quite anomalous in their operation and mode of procedure, and yet they have never been considered as depriving a party of due process of law.

It is also claimed that the proceeding which resulted in giving the bond sued on was void, because the application to the county judge did not state the time and place of filing the specification of the claim. Section two of the act requires such specification to be drawn up and filed only in case of the departure of the vessel from the port at which the debt was contracted. And as, in this case, the vessel had not departed, the specification was not necessary to be made or filed, and hence was not required to be mentioned in the application. Besides, the giving of the bond was a waiver of any technical defect in the prior proceedings. The statute creates the lien, and it exists before any proceedings are instituted, and independently of such proceedings; and the bond is conditioned to pay

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Opinion of the Commission, per EARL, C.

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the lien which existed at the time the application was made. The obligation of the bond can therefore be discharged only by showing that no debt was due or that no lien existed.

The remaining questions to be considered in this case are more serious. After all the lumber was delivered, the plaintiff settled with Caler, and took his note for the amount due him; he took it to the bank, and learning that it was not drawn right, returned it to Caler. He then had another note drawn, and, not finding Caler, he took it home, and his son, as is claimed, without his knowledge or consent, took it and got Caler to sign it. The son kept it two weeks and then delivered it to the plaintiff, who then first knew of its execution. The note is dated May 28, 1864, payable in three months from date. The plaintiff testified that he did not accept it as payment, but that he kept it and never offered to return it. The application to the county judge was made, the warrant to the sheriff was issued, the vessel was seized, and the bond sued on was given in the month of July, and this action was commenced soon thereafter.

It matters not that the plaintiff's son took this note without his knowledge or consent. His son assumed to act for him, and when he learned what his son had done for him he adopted and ratified his act by taking and keeping the note. Hence, it must have the same force and effect as if the plaintiff himself had taken it. It did not operate as payment of the debt for which it was given, and probably did not destroy the lien upon the vessel, as that could continue for six months notwithstanding the note. But it extended the time of payment of the debt until the note matured. Such is always the effect of a note upon time for an antecedent debt, and here there is no proof even that the parties agreed or understood that it should not have this effect. The plaintiff could not take and hold this note, and secretly, in his own mind, intend that it should have no effect.

Until this note matured, therefore, the plaintiff could not sue Caler for the debt, and he could not institute the proceeding before the county judge to enforce its collection.

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Opinion of the Commission, per EARL, C.

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The condition of the bond is not to pay claims which were liens only, but such claims as were both *due* and liens at the time the application to the county judge was made.

The proceeding before the county judge was, therefore, prematurely instituted, and the plaintiff should have been nonsuited. There was nothing in reference to this question to be submitted to the jury.

Upon the trial it was incumbent upon the plaintiff to show that this lumber had actually been all used in the construction of the vessel before the application was made to the county judge on the 11th of July. And this he was bound to do by evidence competent as against the defendants. Whether all this lumber was used in the construction of this vessel was seriously controverted upon the trial; and to prove that it was, the plaintiff was permitted, against the objection of the defendants, to give evidence of the declarations and admissions of Caler and his agent, Minerly, made after all the lumber had been delivered. I cannot doubt that this was error. Caler was in no sense the agent of Mosher. He had a contract to build the vessel, and there was no such relation between him and Mosher as would make his declarations competent against the latter, and they were no part of any *res gestæ* so as to make them competent. They were not made when the debt was contracted, but afterward. Assume that they were made in a settlement between Caler and plaintiff before the lumber had been delivered and used, they would then have been good evidence against Caler if he had been a party to the record. But as against these defendants the delivery and use of the lumber must be proved by competent common-law evidence, and cannot be established by the admissions of Caler or his agent, however solemnly made.

Upon the two grounds discussed, I am for a reversal of the judgment, and ordering new trial, costs to abide event.

All concur.

Judgment reversed.



## Statement of case.

MARY A. POTTER, sole devisee, etc., Respondent, v. EDWARD ELLICE, Appellant.

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77 AD\*456  
77 AD\*464

The personal representatives of a deceased vendor are necessary parties to an action to compel a specific performance of his contract of sale. Where, however, the heir alone is made defendant, and the defect appears upon the face of the complaint, if no demurrer is interposed the defect is to be deemed waived, and his right to object is at an end.

In such an action against the heir, the complaint alleged the appointment of W. and R. as administrators of the deceased vendor. At the close of the testimony, defendant's counsel moved to dismiss complaint, upon the ground that said W. and R. were not made parties, which motion was denied. No reference was made in the motion to their representative capacity. *Held*, that defendant was not charged with the protection of the rights of the administrators, and could only complain of what injured him; that, in order to raise the question upon appeal of a noncompliance with the requirements of section 123 of the Code, which directs the court, where a complete determination of the controversy cannot be had without the presence of other parties, to cause them to be brought in, defendant should have called the court's attention thereto, obtained a ruling and taken an exception upon the trial; and that the motion was not sufficiently specific to raise the question and give defendant the benefit of an exception that the administrators, as such, were not made parties.

(Argued September 27, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial district, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This is an action against the heir of a vendor, to compel the specific conveyance of land. The executors of the deceased vendor are not made parties. The litigation at the trial was chiefly upon the claim of the defendant that he could repudiate the contract because the payments were not made at the time specified in the contract. The complaint alleged the death of the vendor, and the appointment by the surrogate of St. Lawrence county of Charles R. Westbrook and John F. Rossell as his administrators within this State, which was not denied in the answer. Charles R. Westbrook was the attorney of the defendant in this action.

## Statement of case.

At the close of the testimony, the defendant's attorney "moved to dismiss the complaint, on the ground that the said Charles R. Westbrook and John F. Rossell were not made parties to the action." The motion was denied by the referee, who rendered judgment for the plaintiff to the effect that the property be conveyed by the defendant to the plaintiff; that the money paid into court by the plaintiff (upon a tender) remain until the delivery and execution of the said deed to the plaintiff, and that then the same be paid to the administrator of Ellice, upon application for the same to the court.

*L. Hasbrouck, Jr.*, for the appellant. The administrators of Edward Ellice were necessary parties, and should have been brought in. (2 R. S., 5th ed., 170, § 12; *Moore v. Burrows*, 34 Barb., 173; *Lewis v. Smith*, 5 Seld., 502, 510; *Smith v. Gage*, 41 Barb., 60, 66; Story's Eq. Pl., § 137; Barb. on Parties, 334; Code, § 122; 2 R. S. [Edm. ed.], 202, § 169; *McMahon v. Allen*, 12 How., 39; *Swarthout v. Burr*, 1 Barb., 495; *Adams v. Green*, 34 Barb., 176; Colant on Parties in Eq., 293; *Heirs of Dyer v. Potter*, 2 J. Ch., 152; *Davis v. Mayor of New York*, 2 Duer., 665; *Powell v. Fitch*, 5 Duer., 666; 7 Abb., 223.) Defendant could not raise the question by demurrer, as his own interests were not affected. (*Newbold v. Warren*, 18 Abb., 80; 14 How., 460.) Plaintiff cannot now apply to have parties brought in. (*Brown v. Colie*, 1 E. D. Smith, 270; *Ketcham v. Zerega*, id., 562.)

*S. W. Jackson* for the respondent. The case is a proper one for a decree of specific performance. (2 Story's Eq., §§ 775, 776; Willard Eq., 292; *Harris v. Troup*, 8 Paige, 423; *Voorhees v. Dernyn*, 2 Barb., 48; 19 Vesey, 220; 16 Beav., 59, 60; *Edgerton v. Peckham*, 11 Paige, 352.) The action was properly brought against the vendor as heir-at-law. (*Swarthout v. Burr*, 1 Barb., 449; *Moore v. Burrows*, 34 Barb., 175; 2 R. S., § 169; 1 Serg. on Vendors, 264.) Defendant cannot now raise the objection of non-joinder of the administrators. (§§ 144, 147, 148; *Palmer v. Davis*, 28 N. Y., 246; *Moore v. Burrows*, 34 Barb., 175; 39 N. Y., 49, 287.)

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Opinion of the Commission, per HUNT, C.

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HUNT, C. It is difficult to say that this action is well brought, the administrators of Mr. Ellice not being made parties. The heir of Mr. Ellice holds the legal title, in trust, to convey the same to the vendee upon performance of the conditions of the contract. He is a mere instrument, having no real interest in the matter in a case where the contract is performed. The administrators are the real parties in interest. Both by the statute and the common law the interest in the contract passes to them. They are the parties to whom the money is to be paid, and who have the entire beneficial interest in the contract. Their discharge or receipt is a necessary muniment to the vendee. They are the parties not only who receive, but who are to settle or to contest, as the case may be, the amount to be paid by the vendee in fulfillment of his contract. No one else can legally adjust the amount to be paid, or acquit for the payment. (2 R. S., 83; id., 194, § 169; *Havens v. Patterson*, 43 N. Y., 221; *Lewis v. Smith*, 5 Seld., 502, 510; 1 Sug. on Vend., 264; Calvert on Parties in Eq., 327.) The administrators are parties, without whose action some of the most important points cannot be determined. Among these are the existence of the contract and the amount to be paid in fulfillment of its terms. Admitting these general rules, the court below supposed that reasons existed why they should not control the present case. Among other things, it is said that the personal representatives of the vendor were tendered the amount claimed to be due upon the contract, according to their own statement of the amount due. How has this been established, and by whom? By witnesses in a suit to which the administrators were not parties. This is a loose rule, by which the parties are to be bound, and their rights cut off by testimony in suits to which they are not parties, and in which they have no opportunity to establish their rights.

It is said, also, that Mr. Westbrook, one of the administrators, is also the defendant's attorney in this suit. All we know is, that a gentleman by the name of Charles R. Westbrook is one of Mr. Ellice's administrators, and that a gentle-

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Opinion of the Commission, per HUNT, C.

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man of the same name appears as an attorney in this suit. This is an accidental circumstance, which cannot affect the rule of law or alter the general principle. Mr. Rossell is one of the administrators, but not one of the attorneys. He may be the one administrator who knows the facts of the case, and who is kept in ignorance of the present proceeding, by which they are to be affected.

It is further stated in the opinion below that where the vendee and the heir are the only parties, a judgment might be made saving and protecting the rights of the administrators, to wit: the right to litigate the amount of the purchase-money and the protection of the heir for its payment. If a judgment were thus rendered, it is quite possible that a purchaser under the judgment would be held to have notice and to buy subject to those reservations. This is not, however, a practical question in the present case. The amount of the purchase-money due is absolutely fixed by the judgment, and upon payment of the amount to the clerk the plaintiff is entitled to his deed, free from all question or condition. There are no reservations or restrictions contained in the judgment entered in this case.

Upon the abstract question discussed, I find great difficulty in sustaining the judgment. I apprehend, however, that the point discussed has not been so presented that it is necessarily or fairly in the case. On the evidence as it is before us, there is no reason to suspect fraud, collusion, or that the omission is other than an error in pleading. As I have already shown, this may be otherwise, but there is nothing here to make us suspect that the case is other than a fair one, and that the amount has been properly ascertained.

All the facts are set forth in the complaint, and the respondent alleges that if the administrators were necessary parties, the objection should have been taken by demurrer. (Code, §§ 143 to 148.) It is provided by these sections that the defendant may demur to the complaint when it shall appear on the face thereof. 4th. That there is a defect of parties, plaintiff or defendant. It is further provided that if such objection be

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Opinion of the Commission, per HUNT, C.

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not taken by demurrer, the defendant shall be deemed to have waived the same. It has been many times decided that the term defect of parties applies to a case where there are too few named; where some are omitted, who should have been made parties. (*Palmer v. Davis*, 28 N. Y., 242; *De Puy v. Strong*, 37 id., 372; *Fisher v. Hall*, 41 N. Y., 416.) The present is a case where the defect is not the want of facts sufficient to constitute a cause of action. All the facts are stated that exist, and they are enough to give a cause of action. The only difficulty is that more persons should have been made defendants to answer to the complaint. This defect was apparent on the face of the complaint. A demurrer should have been interposed, and for the want of it the defect is to be deemed waived. So far as the defendant is concerned, he cannot complain that the defect is waived. His right to object is at an end. If the administrators should think the case one requiring action on their part, a new question would be presented, which we are not called upon now to consider. I do not see that they are cut off from their action by anything that has occurred.

Another section of the Code (§ 122) enacts that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." The attention of the court below does not appear to have been called to this section; nor was any request made that the cause should stand over to add parties. The only reference to this branch of the case was in a motion to dismiss the complaint. The defendant's attorney is not charged with the defence of or the protection of the rights of the administrators. He appears for the heir only, as does his counsel here. He can complain only of what injures his client. He has nothing to do with other interests. If the defendant has any interest in the provisions of this section, he should have made a point upon it at the trial, asked a ruling and taken

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Statement of case.

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his exception. He did not do this, and he cannot now allege the want of the action as error.

The reference to this subject at the trial is contained in the following paragraph of the case: "The defendant then moved to dismiss the complaint on the ground that the said Charles R. Westbrook and John F. Rossell were not made parties to the action. This question was argued before the referee, and at a subsequent day the referee delivered his report in writing. \* \* \* The defendant excepted to the decision of the referee that the administrators of Edward Ellice are not necessary parties to this action." In the motion to dismiss, Westbrook and Rossell are named personally, with no reference to them as administrators. Westbrook was attorney as well as administrator; and the party who wishes the advantage of an exception must specify in his motion exactly what he claims to have. His motion and his exception must correspond. It is not good practice to name in a motion Westbrook and Rossell as proper parties, and to except because the administrators of Ellice are not made parties.

I am of opinion that the objection discussed was not properly before the court, and that the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

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167	511

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THE CAMBRIDGE VALLEY BANK, Respondent, v. AVERY S. DELANO et al., Appellants.

SARAH C. WORRELL, by guardian, etc., Respondent, v. THE EXCHANGE BANK OF LOCKPORT et al., Appellants.

A purchaser of land is chargeable with notice by implication of every fact affecting the title, which would be discovered by an examination of the deeds or other muniments of title of his vendor, and, where he has knowledge of any facts sufficient to put a prudent man upon an inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some rights or title in conflict with that he is about to purchase, the law will presume he made the inquiry, and will charge him with the notice he would have received if he had made it.

## Statement of case.

No more than ordinary prudence and diligence is required, however, and where, therefore, the vendor's deed refers to an incumbrance upon the land, the fact that the incumbrance described was discharged of record prior to the execution of such deed, is not sufficient to charge a purchaser with constructive notice of the existence of another and entirely different lien, which nowhere appears upon record as a charge upon the premises.

G. M. died seized of certain premises situate partly in Orleans and partly in Niagara counties. Upon a portion of the premises in Orleans county was a mortgage of \$2,160; upon a portion in Niagara was a nominal mortgage of \$1,690, which was inoperative, but recorded and an apparent lien. After the death of G. M., actual partition was made of the lands among the heirs, and, to equalize the division, the commissioners intended to charge upon two of the shares, which were portions of the lands in Niagara county, the payment of the \$2,160 mortgage, leaving the portion in Orleans county freed therefrom; but, by mistake, they named and described the \$1,690 mortgage, and the same mistake was repeated and included in the decree. D. contracted to purchase the shares in Niagara county, assuming and agreeing to pay the \$1,690 mortgage. Prior to his receiving deeds, the mistake was discovered, and upon the heirs making up the difference, D., by parol, assumed and agreed to pay the \$2,160 mortgage, and the \$1,690 mortgage was satisfied and discharged of record, but, upon drawing the deed, the mistake was repeated and the lands were deeded to D., subject to the \$1,690 mortgage. D. sold and conveyed, without mention of either mortgage. In an action brought by W., owning the premises in Orleans county, to relieve them of the \$2,160 mortgage, and to charge the mortgage debt primarily upon the lands in Niagara,—*Held* that there was nothing appearing in the papers or upon the records sufficient to put D.'s grantee or subsequent grantees or mortgagees upon inquiry or to charge them with constructive notice of the fact that the lands conveyed by D. were, as regards him, subject to the payment of said mortgage.

(Argued September 28, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court, in the eighth judicial district, affirming a judgment of foreclosure, etc., entered on a report of a referee.

The action of the Cambridge Valley Bank was brought to foreclose a mortgage.

The action of Sarah C. Worrell was brought to relieve the mortgaged premises, and charge the mortgage debt primarily on other lands.

The mortgage sought to be foreclosed was made by Gad

## Statement of case.

Mather and wife to Washington Hunt, president of the Lockport Bank and Trust Company, dated October 4, 1838, to secure the payment of \$2,160, with interest, recorded in Orleans county, October 9, 1838, in book No. 12, page 394.

The premises described in the mortgage contained about ninety-five acres of land, situate in the county of Orleans. This mortgage was assigned to the Cambridge Valley Bank, the plaintiff in the first suit. Sarah C. Worrell, the plaintiff in the second suit, put in an answer to the complaint in the foreclosure action, alleging (with other defences not now insisted on) certain facts, showing that other lands, situate in Niagara county, owned by Gad Mather when he made the said mortgage, should be first sold to satisfy that mortgage.

None of the other defendants answered.

Sarah C. Worrell soon afterward commenced her action against the Cambridge Valley Bank, the Exchange Bank of Lockport, John Cornes, Buel P. Barnes and others, claiming to have the premises described in the mortgage, which are situate in Orleans county, relieved from the lien of said mortgage, and that other lands, situate in Niagara county, be charged therewith, and sold to satisfy it.

Each of the defendants above named, answered the complaint of Sarah C. Worrell separately. The said two actions were referred to the same referee and tried together.

The referee reported the following facts and conclusions of law, viz.: Gad Mather died in April, 1841, seized of a farm of 413 acres, situate partly in Orleans county and partly in Niagara county. He had executed the following mortgages on different parcels of the said land: July 28, 1837, a mortgage for \$408, with interest, to the loan commissioners of Niagara county, on fifty acres from the north part of the land in Niagara county, designated in the records of said commissioners as No. 57. October 4, 1838, a mortgage for \$2,160, with interest, to Washington Hunt, president of the Lockport Bank and Trust Company, on ninety-five acres of the land in Orleans county, being the mortgage in question. October 4, 1838, another mortgage to Washington Hunt,



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Statement of case.

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president, etc., for \$1,690, with interest, on 106 acres, situate in Niagara county, recorded in that county, October 5, 1838, in Book 16, page 481.

The mortgage for \$408 was satisfied and discharged of record, November 11th, 1855.

The mortgage for \$1,690 never became operative, no consideration having been paid or received, but remained as an apparent lien until June 8th, 1855, when it was satisfied and discharged of record.

In December, 1852, the said farm was owned by Robert Worrell, Lucina Gale, Susan A. Mather and Sarah A. Mather, as tenants in common, and the said Robert Worrell then commenced an action for partition against his co-tenants. Actual partition was made by commissioners appointed, and their report was confirmed, judgment entered and the roll filed on the 3d of May, 1854, in the office of the clerk of Niagara county.

Robert Worrell alleged in his complaint in the partition suit, which was part of the said judgment roll that the premises were incumbered by the said mortgage for \$1,690. The report of the commissioners states that the mortgage for \$408 and that for \$1,690 are incumbrances, describing the parties, the date, and the book and page, where recorded correctly. The report further states that, in making partition, the commissioners took these two mortgages into account, and charged the payment thereof to the persons to whom the premises affected thereby were allotted. The amount due thereon, with interest, was stated at \$3,072.84, and charged upon the shares of Susan A. and Sarah A. Mather.

The lands allotted to Robert Worrell were situated in Orleans county, and included the ninety-five acres embraced in the mortgage for \$2,160, but neither the report of the commissioners nor the judgment in partition mention or refer to this mortgage. The shares of Robert Worrell and Lucina Gale were not charged, or intended to be charged, with any incumbrance.

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Statement of case.

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The referee in these actions finds and reports that the commissioners in partition, by mistake, specify the mortgage for \$1,690 in their report, instead of the mortgage for \$2,160, and the same mistake is followed and included in the judgment in partition.

On the 11th of May, 1855, Avery S. Delano contracted to purchase and then took possession of the lands so allotted to Lucina Gale, Susan A. and Sarah A. Mather, at the price of sixty dollars per acre, and, as part of the purchase-money, assumed to pay the said two mortgages of \$408 and \$1,690. The said mistake had been then discovered, and he purchased with full knowledge of it; and the proportion of the excess which each of the said co-tenants should have paid, or which should have been charged on their respective shares, was fixed and agreed on; and it was agreed between them and said Delano that he should pay off the whole of the incumbrance, and should be credited for the proportion of such excess to be borne by Susan A. and Sarah A. Mather, upon the purchase-price payable to them, and that Robert Worrell should pay his proportion of such excess to said Delano. In pursuance of said agreement, Robert Worrell paid him \$149.57 for his proportion, and Delano assumed the payment of the mortgage for \$2,160, as part of the purchase-price of the premises which he had agreed to purchase. By his procurement, it was assigned to the Cambridge Valley Bank, August 22d, 1855.

On the 11th of June, 1855, Lucina Gale and Susan A. Mather executed their deed, of the parts of the said farm allotted to them, to said Delano, expressing therein that it was subject to two mortgages, one to the loan commissioners for \$408, and "the other made by Gad Mather to Washington Hunt, president of the Lockport Bank and Trust Company, to secure \$1,690, dated October 4, 1838, recorded in Niagara county clerk's office, in book of mortgages No. 16, on page 481." The referee finds that the mortgage for \$1,690 was described in the said deed by mistake, instead of the said mortgage for \$2,160.

This deed was recorded on the day of its date in the clerk's

## Statement of case.

office of Niagara county. Delano at the same time executed his bond and mortgage to Susan A. Mather for \$5,842, with interest, dated May 11th, 1855, recorded the same day in Niagara county, upon the premises so conveyed by her, to secure part of the purchase price. Sarah A. Mather was a minor, and proceedings were had, and a special guardian appointed, by an order of the Supreme Court, to convey her real estate. In the petition in said proceeding, it was stated, among other things, "that her share is subject to and charged with the payment of about \$2,000 upon two mortgages made by Gad Mather, the father of said infant, and which mortgages are now due, etc., and that the holder of one of said mortgages requires the same to be paid in a few months."

The court ordered that Delano pay down the amount which the infant, Sarah A., was bound to pay on these mortgages, \$2,168, and the residue, \$5,832, with interest, was to be secured by mortgage on the land conveyed by her.

The special guardian was ordered to convey the land belonging to the infant to Delano, on his complying with these terms, and the deed and mortgage were duly executed, delivered and recorded.

The referee further finds that Delano did not, in fact, pay any part of the consideration of this deed, except by executing his mortgage upon the premises, so conveyed, for \$5,832, and by assuming to pay the balance of said consideration upon the mortgage for \$2,160. This deed and the mortgage bear date the 1st day of December, 1855, and are recorded in Niagara county, January 28, 1856. Delano had at this time paid the mortgage for \$408, and had reduced the mortgage for \$2,160, by payments, to \$1,910. He never paid anything further on account of the principal, although he afterward paid interest; and he never paid any further sum on the purchase-price of the said farm.

The said mortgage to Sarah A. Mather was in February, 1861, sold and assigned to the Exchange Bank of Lockport, and in December, 1862, the said mortgage to Susan A. Mather

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Statement of case.

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was also sold and assigned to the said Exchange Bank. These assignments were duly recorded in Niagara county.

On the 1st of May, 1856, Delano executed a mortgage to the said Exchange Bank, on the lands so sold and conveyed to him, for the sum of \$25,000, recorded in Niagara county, May 3d, 1856. This mortgage was to secure present and future advances.

On the 18th of May, 1857, Delano sold and conveyed the said lands to John Cornes, by deed dated that day, and duly recorded in Niagara county. Cornes paid Delano \$2,000 in cash, and assumed the payment of the two mortgages to Susan A. and Sarah A. Mather, for \$5,832 each, and the said mortgage for \$25,000, on which the sum of \$12,000 was owing to the Exchange Bank; and for the last mentioned sum he executed his own mortgage to that bank, which was duly recorded in Niagara county on the 8th of June, 1857, and the mortgage for \$25,000 was then satisfied of record.

On the 31st of December, 1857, Cornes sold and conveyed the same lands to Buel P. Barnes for \$2,000 in cash, and he assumed the said two mortgages for \$5,832, and the said mortgage for \$12,000. This deed was duly recorded in Niagara county.

The said Exchange Bank foreclosed the said mortgage for \$12,000, in 1862, and, upon a sale under the judgment of foreclosure in that action, purchased the said lands at the price of \$10,000, and the deed to the said bank was duly recorded in Niagara county, August 12, 1862.

The referee finds that neither the Exchange Bank nor its officers, nor said Cornes, nor said Barnes had any knowledge or notice (other than such constructive notice, if any, as the law would presume to be given by the proceedings in partition, and the proceedings for the sale of the infant's estate, as above mentioned) of the mistake in providing for the payment of the mortgage for \$1,690, instead of that for \$2,160; nor that the mortgage for \$2,160 was intended to have been made a charge upon the premises allotted to Susan A. and Sarah A. Mather; nor that the said mortgage was

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Statement of case.

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unpaid; nor that the sums so adjudged to be paid by the said Susan A. and Sarah A. for equality of partition were unpaid; nor that the mortgage for \$2,160 was in any manner an equitable lien or charge upon the lands so conveyed to Cornes; nor that Sarah C. Worrell had or claimed any interest in or lien upon said lands, nor of the equities claimed by her in her complaint.

Robert Worrell died in 1861, seized of the land so allotted to him, leaving the said Sarah C. Worrell his only child and heir-at-law.

The referee found that there was due on the mortgage for \$2,160, held by the Cambridge Valley Bank, the sum of \$1,910 of principal, and interest from the first day of June, 1860, to the date of his report, August 15th, 1863, together amounting to the sum of \$2,338.97. As conclusions of law the referee found:

1. That the Cambridge Valley Bank was entitled to judgment of foreclosure for the said sum reported due, with interest from the date of the report, and costs in both actions.

2. That the parties specifically named in the action of Sarah C. Worrell, except the Cambridge Valley Bank, acquired their interests and titles, with constructive notice, by reason of said proceedings in partition, and said proceedings to sell said infant's estate; that said premises were charged with and subject to the payment of said mortgage for \$2,160 under the said proceedings, and it was an incumbrance thereon.

3. Directs judgment of foreclosure, etc. That the sums charged upon the shares allotted to the said Susan A. and Sarah A. Mather be collected by a sale of said shares respectively; and if those lands should prove insufficient, that the balance be collected by a sale of the lands allotted to Robert Worrell and Lucina Gale, in certain proportions, according to their respective interests, and that Sarah C. Worrell have judgment for the sale of the premises in the order mentioned, with costs, etc.

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Opinion of the Commission, per LEONARD, C.

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The said defendants excepted to each of the said conclusions of law.

Judgment was entered in accordance with report.

*Francois Kernan*, for the appellants.

*L. F. Bowen*, for the respondent the Cambridge Valley Bank.

*Amasa J. Parker*, for the respondent, Sarah C. Worrell. The defendants, who acquired title to the lands allotted to Sarah A. and Susan A. Mather, took the same with constructive notice that they were subject to the payment of the \$2,160 mortgage. (2 Wash. on Real Prop., 594, § 63; 2 Greenl. Crim., 855, note 1; *Colclough v. Sleeman*, 3 Bligh., 181; Story's Eq. Jur., note 4 to § 1132; *Brathwaite v. Britain*, 2 Keen, 222; *Gardner v. Gardner*, 3 Mason, 218; *Potter v. Gardner*, 12 Wheat., 498; *Andrews v. Sparhawk*, 13 Pick., 401; *Brush v. Ware*, 15 Peters, 111; *Reeder v. Burr*, 4 Ham., 446; 3 J. Ch., 345.) The judgment declares these shares exceed the interests of those to whom they were allotted to the amount they were adjudged to pay, and it is expressly charged upon them; as the amount is unpaid, the charge remains unsatisfied. (*Bloom v. Burdick*, 1 Hill, 141; U. S. Digest, 353, Pl., 19; 10 id., 343, Pl., 23; 11 id., 353, Pl., 18, 19, 20; 13 id., 511, Pl., 8, 14; id., 458, Pl., 16, 19; *Corrister v. Gaffney*, 21 Barb., 14, 15.) The mis-description may be helped by parol evidence. (*Wood v. Le Baron*, 8 Cush., 471.) The conveyance of the infant's share is void, unless the order authorizing it is complied with. (*Swarthout v. Swarthout*, 7 Barb., 354; 1 Seld., 301; *Brathwaite v. Britain*, 1 Keen, 206; 2 Wash., 538, § 5.)

LEONARD, C. There were three clear mistakes in respect to charging the mortgage for \$2,160, now sought to be foreclosed, upon the lands allotted by the judgment in partition to Susan A. and Sarah A. Mather: First, in the report of the

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Opinion of the Commission, per LEONARD, C.

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commissioners, and in the judgment roll in partition, whereby an inoperative mortgage for \$1,690 was expressly charged upon their lands, instead of that for \$2,160, which was actually outstanding and unpaid, although on different premises; second, in the proceedings for the appointment of a special guardian, and for the sale of the lands allotted to Sarah A. Mather, in omitting to name the said mortgage for \$2,160 specifically, as having been charged in part upon her said lands by the said judgment in partition; third, in the deeds from Susan A. Mather and Lucina Gale to Avery S. Delano, in stating expressly that the lands thereby conveyed were subject to the said mortgage for \$1,690, and omitting to state that the lands were subject to that for \$2,160. The first two mistakes probably arose from ignorance of all parties interested as to the true state of the facts and the want of proper investigation. I infer that the parties knew nothing of the mortgage for \$2,160. They were not aware of the mistake or the real facts in respect to the two mortgages, so far as it appears from the case or the report of the referee, until about the time of the contract for the sale to Delano, in May, 1855. The mistake was then settled among the parties, each agreeing to bear a proportionate share of the excess in amount of the larger mortgage. Delano, as is found by the referee, agreed to assume the mortgage for \$2,160, as part of the consideration to be paid by him for the lands purchased of Susan A. and Sarah A. Mather and Lucina Gale. In preparing the deed to Delano, the lesser mortgage for \$1,690 was stated as one of the incumbrances which he assumed, instead of that for \$2,160. This latter mistake was a palpable blunder, made with full knowledge of the real facts. If the question was to be considered with regard to the rights of Delano as purchaser, the case would be free of any difficulty. The question now is, whether there is any constructive notice arising from the face of the records in the partition suit, or the proceedings to appoint a special guardian and to authorize the sale of the lands of an infant owner, or from the deeds to Delano,

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Opinion of the Commission, per LEONARD, C.

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whereby the subsequent purchasers and mortgagors of the lands conveyed to them are to be charged with the payment of the mortgage for \$2,160 instead of the lands specifically described in the said mortgage. The lands therein mentioned are situated in Orleans county, are a specific lien upon the larger portion of the estate of Gad Murphy allotted to Robert Worrell, the father of Sarah C. Worrell, the plaintiff, and never became a lien of record upon any portion of the lands allotted to the other parties in the partition suit. It was intended and believed, by the commissioners in partition, that the lands allotted to Robert Worrell were free from incumbrance. Equitably, and according to the intention of the commissioners, there is no doubt that this mortgage, as against Susan A. and Sarah A. Mather, is chargeable primarily upon the lands allotted to them. The same equity exists as against Delano, who expressly agreed to assume this mortgage when he became the purchaser of the land in Niagara county. It was due to their negligence that the deed to Delano was not properly framed to charge the land conveyed with the outstanding mortgage in another county, instead of the inoperative one that was only an apparent lien on the 11th of May, 1855, when he agreed to become the purchaser, and which had been satisfied of record on the 8th of June, 1855, three days prior to the date of the deed.

The principle of equity is well established that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title, which would be discovered by an examination of the deeds or other muniment of title of his vendor, and of every fact, as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted. If there is sufficient contained in any deed or record which a prudent purchaser ought to examine, to induce an inquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the facts so contained. With the most careful scrutiny, we look in vain for anything in the commissioners' report or the judgment in partition, or the proceedings for the sale of the share allotted to the infant



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Opinion of the Commission, per LEONARD, C.

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daughter of Gad Mather, to cause a suspicion that the mortgage on lands in Orleans county in any manner affected the lands allotted to Lucina Gale and Susan A. and Sarah A. Mather; or indeed that any such mortgage existed anywhere. The Supreme Court recognize the correctness of this statement, and the error into which the referee had fallen in this respect.

It is supposed, however, that the deed to Delano develops matter which ought to put a prudent person on inquiry. The deed from the infant, by her guardian, has no reference to any mortgage, so far as the evidence or the report disclose. The other deed, that from Lucina Gale and Susan A. Mather, refers to a mortgage which had been a specific lien at the date of the agreement to purchase, but was satisfied of record three days prior to the date of the deed. Why should John Cornes or Buel P. Barnes have any reason to suspect that there was another mortgage, or even to doubt that the other mortgage mentioned, that to the loan commissioners, was the only remaining incumbrance that had been created by the owners prior to Delano? They had no occasion to search the records of Orleans county. Nor can we perceive any occasion to make inquiry of the president or other officer of the Lockport Bank and Trust Company. That bank had just satisfied a mortgage which had been a lien specifically on the land in Niagara county. Surely this fact gave rise to no cause of suspicion that the bank had not been paid, or that the bank held another mortgage which was a charge on the land so purchased. They had no cause to inquire even who had paid that mortgage. It might well be presumed that Delano had paid it, as the deed required him to do so, although executed subsequently to the satisfaction of the mortgage. It was a subject of private arrangement between the parties to that deed, with which subsequent purchasers had no concern. It was sufficient for them that a mortgage assumed by the deed in express and definite terms, as well as by an exact and formal description of date, parties, amount and place of record, was satisfied and dis-

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Opinion of the Commission, per LEONARD, C.

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charged. To hold the subsequent purchasers in this case to be chargeable with notice of the mortgage on property in Orleans county, would enlarge the rule, before referred to, to an alarming extent, and would render an examination of title no rule of safety in the transfer or acquisition of real estate. The most astute and vigilant lawyer in the examination of a title, would never find a hint of any latent equity or incumbrance from the facts apparent here.

With regard to equities between the plaintiff, Sarah C. Worrell, and her aunts, Susan A. and Sarah A. Mather, in respect to the payment of the sums charged upon the shares allotted to them, as between them and her father Robert Worrell, on the partition of the land, we have nothing to do. They are not parties to either action. Our inquiry here has reference only to adjusting the order of sale of the premises, if the lands in Niagara county had been proven to be, in fact, chargeable.

Nor is the case fully before this court as to the rights and equities existing between the said Sarah C. Worrell, plaintiff, and the Exchange Bank, as owners of the two mortgages for \$5,832 each, assigned by Susan A. and the guardian of Sarah A. Mather, and executed by Delano to them, as part of the consideration of the conveyance, to him.

As against the mortgage of Buel P. Barnes to the Exchange Bank, for \$12,000, and the title acquired on the sale under the foreclosure of the last mentioned mortgage, the said Sarah C. Worrell appears, on the evidence before this court, to have no equities, for the same reasons that are applicable to the title acquired by Cornes and Barnes. We render no judgment on that branch of the case.

All that portion of the judgment appealed from, which provides for the foreclosure and sale of the mortgaged premises situate in Orleans county, particularly mentioned in the complaint of the Cambridge Valley Bank, plaintiff, and for the costs of that bank in the said two actions tried together, should be affirmed, with the costs of the Cambridge Valley Bank on the appeals to the Supreme Court and to

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Opinion of the Commission, per EARL, C.

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the Court of Appeals, to be paid by the referee out of the proceeds of the mortgaged premises.

The residue of the said judgment, after the description of the premises in Orleans county, mentioned and described in the mortgage sought to be foreclosed in the action of the Cambridge Valley Bank, plaintiff, should be reversed, and a new trial ordered in the action of Sarah C. Worrell, plaintiff, with costs to abide the event.

EARL, C. The referee found that the appellants had no actual notice that the mortgage held by the Cambridge Valley Bank was in any way a lien upon the lands in Niagara county; but he held, as a matter of law, that the appellants had constructive notice thereof, by reason of the proceedings in partition, and the proceedings to sell the real estate of Sarah A. Mather, an infant, and hence, that they were not entitled to the protection of purchasers in good faith, for value.

The learned judge who wrote the opinion of the General Term held that the proceedings referred to did not give the constructive notice, but that the deed from Lucina Gale and Susan A. Mather did, and the judgment was thus affirmed for a reason different from that assigned by the referee.

Constructive notice, as defined by Judge Story, is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. (Story's Eq. Jur., § 399.) In 2 Wash. on Real Prop., 596, the author says: "In regard to the extent to which a purchaser is bound by constructive notice, and what a purchaser by a subsequent deed is presumed to know, the rule is, that the law imputes to the purchaser a knowledge of all the facts relating to the same land, appearing at the time of his purchase upon the muniments of title, which it was necessary for him to inspect, in order for him to ascertain the sufficiency of such title; and if an ordinarily diligent search would bring to an inquirer a knowledge of a prior incumbrance or alteration, he is presumed to know of them."

It will not do to carry this doctrine of constructive notice

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Opinion of the Commission, per EARL, C.

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so far as substantially to annul the recording acts, and I think the following definition of constructive notice is sufficiently guarded to furnish a safe rule in most, if not all cases. Where a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry, and if he does not make it, he is guilty of bad faith, or negligence, to such an extent that the law will presume that he made it, and will charge him with the actual notice he would have received if he had made it. (*Williamson v. Brown*, 15 N. Y., 354; *Baker v. Bliss*, 39 N. Y., 70.)

There is nothing in the proceedings in partition to lead the most cautious person to suspect that the mortgage in question was in any way charged upon the lands in Niagara county. It is not even mentioned. The only mortgages mentioned are the loan office mortgage and the mortgage for \$1,690, given to the Lockport Bank and Trust Company, both recorded in the clerk's office of Niagara county, and both at that time unsatisfied upon the record. These two mortgages, to make equality of partition, were charged in different proportions upon the lands allotted to Susan A. and Sarah A. Mather, and there is nothing in the proceedings to excite a suspicion even that there was any mistake as to the mortgages.

In the proceeding to sell the estate of the infant, Sarah A. Mather, there is no mention whatever of the mortgage recorded in Orleans county. The petition to the Supreme Court simply alleges that the premises are subject to and charged with the payment of about \$2,000, upon two mortgages both due, and that the holder of one of them requires payment. An order appointing a special guardian and a reference was made, and the referee made his report, in which he stated that the premises were subject to two mortgages—one of them to the Lockport Bank and Trust Company, upon which there was due about \$1,600, and that the purchaser should be required to pay off said mortgages and give a mortgage

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Opinion of the Commission, per EARL, C.

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for the balance of the purchase-money. The special guardian reported that he had entered into agreement for the sale of the premises to Delano, for \$8,000, to be paid and secured as follows: \$2,167.52, with interest from May 11, 1855, down upon the two mortgages, and the balance to be secured by his bond and mortgage, with interest from May 11, 1855.

This report was confirmed and a conveyance ordered in pursuance of its terms. Afterward a deed was given by the special guardian to Delano, in which payment of the consideration was acknowledged in the usual form; but the deed contained no reference to any mortgage. The mortgage to secure the balance of \$5,832.48, with interest from May 11, 1855, was given and recorded. By examining these proceedings, these are all the facts any person would learn in reference to any mortgage. He would have reason to suppose that Delano took possession of the estate on the 11th of May, 1855, and that he purchased it, as of that date, as he was to pay the amount due upon the two mortgages at that date, with interest, and he was to pay the balance of the purchase-money, with interest from that date. He would find at that date but two mortgages, the loan office mortgage and the \$1,690 mortgage, both satisfied of record before the deed was given, the latter June 8, and the former November 11, 1855, and hence neither of them mentioned in the deed. Having found that the only two mortgages upon the record were satisfied, he would have no occasion or reason to look further. The agreement reported by the special guardian and the order of the court required that the two mortgages referred to in the proceedings should be paid down, and any one examining the records and finding all the mortgages appearing there satisfied, would have the right to suppose, and rest with entire confidence upon the belief, that the agreement and the order of the court had been complied with, and that the mortgages had been paid and satisfied. There was nothing to awaken a suspicion in the mind of a prudent, or even of a very vigilant person, that there remained any mortgage that was in any way a charge upon

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Opinion of the Commission, per EARL, C.

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these premises, or that there was any mistake as to the mortgages mentioned in the proceedings.

It only remains to be considered whether notice of the lien of the mortgage in question is to be imputed to the appellants from anything contained in the deed from Lucina Gale and Susan A. Mather to Delano. This deed was dated June 11, 1855, and was subject to the payment by Delano of the loan office mortgage, and the mortgage for \$1,690, recorded in book of mortgages No. 16, on page 481, in the clerk's office of Niagara county. The deed makes no mention of or allusion to the mortgage for \$2,160; but the learned judge who wrote the opinion at General Term held that, inasmuch as the deed bound Delano to pay a mortgage to the Lockport Bank and Trust Company, and the mortgage described had been satisfied of record before the date of the deed, there was sufficient to put a purchaser who examined the records and learned these facts upon inquiry; and that by inquiring of the Bank and Trust Company, or of Delano or his grantors, he would have learned of the existence of the mortgage in question, and the facts constituting it a lien upon the lands in Niagara county. I cannot concur in these views.

In all the records in Niagara county, there is no mention or hint even of the existence of the mortgage in question. In the partition proceedings commenced in 1852, the only mortgages mentioned and provided for were the two mortgages mentioned in the deed to Delano. The same is true of the proceedings for the sale of the infant's real estate. These mortgages are mentioned not once only, but several times, in proceedings conducted by parties supposed to be familiar with the title to the land, and under circumstances which forbid any presumption of mistake. A purchaser from Delano looking at the records would find these facts, and also that these same mortgages are assumed to be paid by Delano in his deed as part of the purchase-money. But the deed does not state how much is thus assumed, nor how much was at the date of the deed due

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Opinion of the Commission, per EARL, C.

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upon the mortgage. He would also find that in the mortgage given by Delano for the balance of the purchase-price, he agreed to pay interest from May 11th, thus showing that probably he had the benefit of the purchase or had the possession from that date. He would also find that on the 8th day of June, three days before the deed was given, the mortgage for \$1,690 was satisfied of record, and he would infer either that Delano satisfied the mortgage, after making the contract to purchase, or that the vendors had satisfied it and that it was inserted in the deed by mistake, it not appearing how much, if anything, was in fact deducted from the purchase-price on account of that mortgage. But he would not infer, even if he were a very cautious and vigilant person, that there was a mistake as to the mortgage, because it was the only mortgage of the kind that ever appeared upon the records; it was the precise mortgage mentioned and described in all the proceedings from the commencement, and there certainly was nothing whatever to suggest to a reasonably prudent and careful man that there was any other mortgage not recorded which was a charge upon the lands, and which the parties referred to. It would be too much, under such circumstances, to impute bad faith or negligence to a purchaser for not making an inquiry which was probably never suggested to his mind. If the doctrine of constructive notice is to be carried so far, purchasers will frequently be placed in peril who are entitled to the protection of the recording acts.

I therefore hold that there was nothing in this deed from which the law could impute to the appellants notice of the mortgage in question.

All concur.

Judgment in accordance with opinion of LEONARD, C.

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Statement of case.

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PHILIP WHITE et al., Appellants, v. JOHN H. WILLIAMS,  
Respondent.

Defendant agreed to convey to plaintiffs a house and lot in the city of New York. In the description contained in the contract, the lot was stated as "being in depth, on Clinton street, 120 feet, including the stable situated on the rear of said premises." He executed and delivered a deed to carry out the agreement, which followed the description contained therein, except omitting any reference to the stable. It was supposed, at the time of the execution of the contract and deed, that the stable was upon the 120 feet, but subsequently it was discovered that, in order to include the stable, the lot should be 131 feet and ten inches deep. In an action brought by plaintiffs for specific performance,—*Held*, that under the well-settled rule that, in the construction of grants, courses and distances must yield to fixed, known monuments, plaintiffs were entitled to a deed that would include the land upon which the stable stands.

(Agued September 28, 1871; decided January term, 1872.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial district, reversing a judgment in favor of the plaintiffs, entered upon the decision of the court, and ordering a new trial.

The action was brought to compel the specific performance of an agreement to sell a lot in the city of New York. The agreement was in writing, dated August 23d, 1863, and described the lot as follows: "The dwelling-house and lot known as No. 26 Rutger's place, Monroe street, in the city of New York, being the same premises lately conveyed to the party of the first part, by Muller, the said premises being situated in the corner of Rutger's place, twenty-six feet and six inches, and being in depth, on Clinton street, 120 feet to and including the stable situated at the rear of said premises."

On the 12th of September, 1863, the defendant executed a deed to carry out the agreement in which the lot was described, as in the written agreement, except it omitted all reference to the stable, thus conveying a lot twenty-six feet and six inches front and rear, and 120 feet deep.

It appeared that the parties went to the lot when the agree-



## Statement of case.

ment was made, and that the defendant pointed out the rear wall of the stable as the rear line of the lot.

When the contract and the deed were executed, both parties understood that they conveyed the lot to the rear end of the stable, so as to include the stable and the land upon which it stood, and the plaintiffs took possession of the lot and the stable. Some time after they had taken possession, they discovered that the distance of 120 feet did not include the whole of the stable, but that the rear line of the lot, as described in the deed, ran through the stable; and that the lot, in order to include the stable, should be 131 feet and ten inches deep.

It also appeared that the defendant took a conveyance of Peter Muller, June 30, 1863, of two parcels of land; the one described as being a dwelling-house and lot at the northwest corner of Rutger's place (Monroe street) and Clinton street, some twenty-six feet six inches by 120 feet, and the other described as adjoining in the rear, being south-west corner of Madison and Clinton streets, some twenty-six feet six inches by eighty feet. Muller had built the stable upon both lots. It was about twenty-one feet wide, and the rear line of lots passed nearly through its center.

The court ordered judgment in favor of the plaintiffs, in substance requiring defendants to execute and deliver a new deed, including in the description, by appropriate metes and bounds, the land upon which the stable stands, and judgment was entered accordingly.

*Samuel Hand* for appellants. Where there is a discrepancy in a description in a grant between the distance named and a fixed known monument, the latter prevails. (*People v. Law*, 22 How., 109; *Schoonmaker v. Davis*, 44 Barb., 463; *Seldon J. Baldwin v. Brown*, 16 N. Y., 350; *Raynor v. Timerson*, 46 Barb., 518; *Van Wyck v. Wright*, 18 Wend., 157, 168; *Smith v. McAllister*, 14 Barb., 434; Cow. & Hill's Notes, 1378, and cases there cited; *Jackson v. Wedyer*, 7 Cow., 723; *Jackson v. People*, 8 Wend., 189; *Pettit v. Shepard*, 32 N. Y., 97; *Brown v. McEvery*, 5 N. Y. L. Obs.,

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Opinion of the Commission, per EARL, C.

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19.) The words, "including the stable on the rear," would, by well settled construction, carry the land covered by the stable. (*Whitney v. Olney*, 3 Mason, 282; *Johnson v. Raynor*, 6 Gray, 107; *Wooley v. Groton*, 2 Cush., 305; *Co. Lit.*, 5; *Shepard's Touch.*, 90, 94; *Woolman & Smith*, 53 Maine, 81.) The receipt of the former deed, under mistake, is no obstacle to a judgment for specific performance. (*Fonda v. Sage*, 46 Barb., 102.)

*Francis Byrne* for respondents. The principal part of the agreement was the land; the stable was a mere incident. The rule as to fixed monuments does not, therefore, apply. (*Tyler v. Hammond*, 11 Pick., 211; *Union Burial Ground v. Robinson*, 5 Wheat., 21.) Parol evidence was improper to extend the limits. (*Waugh v. Waugh*, 28 N. Y., 94.) The case was equitably disposed of at General Term. (*Coon v. Smith*, 29 N. Y., 392; *Johnson v. Taber*, 6 Seld., 319.)

EARL, C. The Supreme Court, at General Term, reversed the judgment given at Special Term, and held that the plaintiffs were not entitled to the relief demanded by them, because both parties were mutually mistaken as to the depth of the lot, both supposing that the 120 feet would include the whole of the stable.

The evidence and the finding of the judge show that both parties intended, the grantor to sell and the grantees to purchase, to the rear end of the stable. Both, however, supposed that 120 feet would extend the lot thus far. Both parties must stand upon the written agreement, as neither alleges any mistake in it, or claims any reformation of it.

What then is the proper construction of the written agreement according to well-settled rules of law? If the northerly and southerly line is but 120 feet, the whole of the stable is not included. If the whole of the stable is included the line is longer. Which of these descriptions shall prevail?

It is perfectly well settled, that where there is a discrepancy

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Opinion of the Commission, per EARL, C.

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in a description of land between the distance named therein and a fixed known monument, such as a fence, wall, building, or other specified object, the latter must prevail over the former. In *Wendell v. The People* (8 Wend., 183), it is said that, "in the construction of grants, both course and distance must give way to natural or artificial monuments or objects, and courses must be varied and distances lengthened or shortened, so as to conform to the natural or ascertained objects, or bounds called for by the grant." There are numerous other cases to the same effect. These cases all proceed upon the theory that the parties were mistaken as to the courses and distances, and intended to convey by the well-known monuments, in reference to which they were not likely to be mistaken.

It does not help the defendant in this case to claim or show, that both parties were mistaken as to the depth of this lot in feet, so long as it is clear, both by the parol negotiations which preceded the written agreement, and the written agreement itself, that they intended a lot so deep as to include the stable.

There might be cases, in actions for specific performance, where it would not be proper to apply this rule of construction, as if the parties had contracted particularly in reference to distances, and it would be a great hardship for the vendor to convey by the natural or well-known monuments, and clearly inequitable to compel him to do so. But here there is no proof that defendant would be seriously harmed or discommoded if he were compelled to convey the stable, and there is no proof that the consideration paid by the vendees is not an ample price for the whole lot, including the stable.

I, therefore, reach the conclusion that the order of the General Term should be reversed, and the judgment at Special Term affirmed, with costs.

All concur. LEONARD, C., not sitting. ✓

Order reversed.

## Statement of case.

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371

JAMES W. RICHARDSON, Respondent, v. PETER B. CRANDALL,  
Appellant.

Where one furnishing men to fill the quotas of certain towns, under a call of the president, at the requirement of the provost marshal, deposited with him county bonds, under a parol agreement that they should be held as security at the rate of \$550 per man, that the men then and thereafter to be furnished by him should not desert before reaching the place of rendezvous,—*Held*, that the agreement was void, under the statute of frauds, it being an agreement to answer for the default or miscarriage of another, and was not so far executed, by the delivery of the securities, as to give the officer an interest in or right to retain them.

Under the act of congress of 1863 (12 U. S. Stat. at Large, 731), "for enrolling and calling out the national forces," etc., it was the duty of the provost marshal, when men were presented for enlistment, if he found them of suitable age and "not physically or morally unfit for service," to enlist and muster them in. He had no right to reject them, because he thought they would desert, nor to require security against desertion; therefore, aside from the provisions of the statute of frauds, the pledge of such bonds was illegally exacted, and was void, as taken *colore officii*.

If he had a discretion in receiving or rejecting the men presented, it was his duty to have exercised this discretion, under his oath of office, uninfluenced by the security which he exacted. In this view of the case also, the pledge must be considered as against public policy, and taken *colore officii*.

The statute of this State, as to securities taken *colore officii*, does not apply to officers of the United States, but the illegality of such a pledge is determined by the principles of public policy, as sanctioned by the common law.

In order to condemn a security, as taken by a public officer *colore officii*, it is not necessary to show it was taken with an evil or corrupt intent. The officer may not legally exact a bond before he will perform a plain duty or when it tends to a lax performance of duty, although there be no actual corrupt motive. The law looks not to any particular contract to see that it is free from taint of actual fraud, oppression or corruption, but it looks to the general tendency of such contract, and it is condemned if it belongs to a class which the law will not tolerate.

The common-law prohibition is aimed at the public officer, not at the one yielding to his exactions; the parties are not upon an equal footing; and when the former receives securities or money, contrary to those prohibitions, the parties are not *in pari delictu*.

The agreement in this case was also void, as without consideration.

(Argued September 28, 1871; decided January term, 1872.)

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Statement of case.

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APPEAL from an order of the General Term of the Supreme Court, in the fifth judicial district, reversing a judgment in favor of defendant, entered on the decision of the court on a trial, without a jury.

The action was brought by the plaintiff to recover the possession of twenty-two war loan bonds, issued by the county of Oneida, of the estimated value of \$20,000, and damages for the unlawful detention thereof from him.

The complaint sets forth facts showing the plaintiff's ownership of the said bonds, under a title derived from Aaron Richardson, the former lawful owner and holder thereof, and that the defendant, on demand, refused to deliver the same, or any part thereof, and that he wrongfully withheld the possession of them.

The defendant, by his answer, after denying the allegations of the plaintiff in his complaint, sets up as a defence that he, on the 30th day of January, 1865, and before and after that time, was provost marshal of the twenty-first congressional district of this State, under the laws of congress, and as such was engaged in enlisting, mustering and swearing men into the military service of the United States, under the call of the president, made on December, 19, 1864; that the bonds mentioned in the complaint were, on his requirement, deposited by the said Aaron Richardson, from whom the plaintiff derived his title thereto, as a security, to the amount of \$550 per man, that the men then and thereafter to be presented by him, for and on behalf of certain towns for enlistment, and who should be mustered and sworn into the military service of the United States, by him, the said provost marshal, would, after being so mustered and sworn, go forward and be received at the designated rendezvous, or in other words, would not desert the service before reaching such rendezvous; that of the men so presented by the said Richardson, and mustered and sworn into such service, thirty-two men did desert the same before reaching said rendezvous, and were not received thereat, but escaped on the way thereto. He then alleges facts, giving him reason to apprehend desertion, and that it

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Statement of case.

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was under such circumstances, and to guard against such apprehended desertion, that he required the deposit of the bonds, and that he as such provost marshal reported the receipt of such bonds, and the agreement upon which they were received, to John A. Haddock, assistant provost marshal general for the State of New York, and to General J. B. Fry, provost marshal general at Washington, and requested orders respecting the disposition of the same.

The judge who tried the issues found the facts in reference to the ownership and possession of the bonds by the plaintiff, the demand thereof from the defendant and his refusal to deliver the same to be substantially as alleged in the complaint, and that they were deposited with the defendant for the purpose and under the circumstances stated in his answer; that the agreement by and under which such deposit was made was by parol; that the facts were reported by defendant to his superior officers, and that of the number of men presented, mustered and sworn into the service of the United States, twenty-four men did desert the same before reaching said rendezvous and were not received thereat, but escaped on the way thereto. He further found that "the said agreement was fully executed before the commencement of this suit, and nothing remained to be done by either party to consummate or give effect thereto."

As conclusions of law from the said facts he found and decided that the defendant was entitled to hold and retain the possession of the said bonds, and he thereupon ordered judgment directing the return of the said bonds to the defendant, and that the complaint be dismissed with costs.

Exceptions were taken by the plaintiff to so much of the said findings as found that the making and completion of the said agreement and the holding of the said bonds in pursuance thereof by the defendant was reported to his superior officers; that the agreement was fully executed before the commencement of this action, and nothing remained to be done by either party to consummate or give effect thereto, and also to the above conclusions of law. Exceptions were also

## Statement of case.

taken by the plaintiff to the refusal of the said judge to find that the United States government had never ratified or otherwise approved of the defendant's transactions in reference to the said bonds; that it made no claim thereto, that the defendant had never turned them over to the United States, and that he himself had no personal interest in them.

Some exceptions were also taken during the process of the trial, which, so far as they are material to the decision in this court, are sufficiently referred to in the following opinions.

*Francis Kernan* for appellant. The securities were not taken *colore officii*, in violation of any statute. (*Webb v. Albertson*, 4 Barb., 57; *Dole v. Bull et al.*, 2 John. Cases, 239; *Acker v. Burrall*, 21 Wend., 605-607; *Burrall v. Acker*, 23 Wend., 606-608; *Chamberlain v. Buller*, 18 N. Y., 115-118; *Mott v. Robbins*, 1 Hill, 21; *The State v. City of Buffalo*, 2 Hill, 434; *Harp v. Osgood*, 2 Hill, 216; *Commissioners of Highways v. Peck*, 5 Hill, 215; *Lenthal v. Cooke*, 1 Saund., 161; 1 Leving, 254; 2 Salk., 438; *Dole v. Bull*, 2 J. C., 239.) The contract in question was not in violation of any principle of the common law. (*Lenthal v. Cooke*, 1 Saund., 161; 1 Leving, 254; 2 Salk., 438; *Dole v. Bull*, 2 J. C., 239; *Acker v. Burrall*, 21 Wend., 605; 23 Wend., 606; 18 N. Y., 115-118; 2 Hill, 216-218.) It was not taken for a corrupt, illegal or improper purpose. (*Grant v. Morse*, 22 N. Y., 323-5; *Cannan v. Pultz*, 21 N. Y., 547; *Chubbuck v. Vernam*, 42 N. Y., 432.) But if the contract was illegal, the parties were *in pari delictu*, and the court will not afford relief to either. (*Nellis v. Clark*, 4 Hill, 424; *Staples v. Gould*, 5 Seld., 520; *Schermerhorn v. Tallman*, 14 N. Y., 94, 141; *Sackett's Harbor Bank v. Codd*, 18 N. Y., 240; *Oneida Bank v. Ontario Bank*, 21 N. Y., 496; *Tracy v. Talmadge*, 14 N. Y., 162.) If the official duty of defendant did not extend to taking the securities, the government could ratify the contract and avail itself of its benefits. (*Harp v. Osgood*, 2 Hill, 216; *The State v. The City of Buffalo*, per NELSON, J., 2 Hill, 434; Story on Agency,

## Statement of case.

§ 244; 4 Bing., 722; *McLean v. Dunn*, 15 E. C. L., 129; *Pilkington v. Green*, 2 B. & P., 151.) It was within the scope of defendant's duties to take all reasonable measures against desertion. (Laws 37th Cong., 3d sess., 126, 127, §§ 4, 7.)

*Geo. F. Comstock* and *Lyman Tremain* for respondent. The transaction in question falls directly within the statute of the State against taking securities *colore officii*, and within the policy and rules of law on which statutes of this nature are founded. (1 Hill, 298; 4 Sand. S. C., 466; 1 Com., 365; 2 R. S., 286, § 56; 4 Barb., 51; 2 Bulst., 213; 5 Wend., 61; Plowd., 60; 10 Coke, 99; Yelverton, 197; 6 Porter, 335; 30 Mississippi, 624; 19 Wend., 194; 21 id., 58; 7 John., 159, 426; 8 id., 98.)

The contract was void under the statute of frauds, and the pledge can be recovered. (15 J., 503; *Cagger v. Lansing*, 43 N. Y., 550.) The parties were not *in pari delictu*. (*Oneida Bank v. Ontario Bank*, 21 N. Y., 496; *Sackett's Harbor Bank v. Codd*, 18 id., 240; *Tracy v. Talmadge*, 11 N. Y., 162, 183 to 190; Story on Agency, §§ 301, 307, 320.) A pledge until foreclosed is an executory contract; and if invalid, the pledgor may demand and recover possession. (Story on Bailments, §§ 266, 287, 300, 450, 582; 12 Johns, 146; 4 Denio, 227; 4 Barb., 491; 10 Johns., 471; 5 Denio, 269; 1 Peters, 37; 14 Johns., 435; 24 Wend., 230; 7 Cow., 290; 2 Hill, 524.) Defendant cannot without interpleader set up the rights of the United States or any third party. (36 N. Y., 17; 37 N. Y., 256; 33 N. Y., 658; 29 N. Y., 554.) The grantees were not *in pari delictu*. (47 Barb., 345-355, cases cited; *Aubrey v. Fish*, 36 N. Y., 47.) The case is not within that principle, as the plaintiff asks no assistance from the transaction. (Chitty on Contracts, 657; see also, to the same effect, *Sunson v. Bloss*, 7 Taunt., 246; S. C., 2 Marsh, 542; *Dobree v. Napier*, 2 Bing., N. C., 796; *Pellscott v. Angell*, 2 C. M. & R., 313; *Callaghan v. Hallett*, 1 Caines, 104; *Forsyth v. State*, 6 Ohio, 21; *Swan v. Scott*, 11 Serg. & Rawl., 164.)



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Opinion of the Commission, per LOTT, Ch. C.

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LOTT, Ch. C. It appears by the case that the plaintiff, on the trial of the issues, introduced sufficient evidence to prove the ownership and possession of the bonds in question by Aaron Richardson on the thirtieth day of January, 1865; that he on that day deposited them with the defendant and left them in his possession; that he afterwards, and on the fourteenth day of March, 1865, for a good and valuable consideration, sold and assigned the same and the money secured thereby to the plaintiff in this action; that the plaintiff after such sale and transfer to him and before the commencement of this action demanded the said bonds, each and all of them, of and from the said defendant, and that he refused to deliver them.

After that proof had been so given by the plaintiff, he rested his case, and the defendant then offered and introduced testimony tending to sustain and establish the several allegations in his answer. It was thereupon objected on the part of the plaintiff, among other grounds of objection thereto, that the agreement in relation to the deposit of the said bonds was void within the statute of frauds, being a special promise or undertaking, by parol and not in writing, to answer for the default or miscarriage of another person. This objection was well taken. The plaintiff's title to the bonds was clearly established by the evidence introduced by him; and although it also appeared that his assignor, while owner thereof, had deposited them with the defendant and left them in his possession, it was not shown that they were so deposited or left with him as provost marshal or as a public officer, or otherwise than in his individual capacity, as a mere naked bailee thereof, holding the same as the plaintiff's property, subject to his control and disposition thereof, and having himself no interest therein, either personally or as trustee or otherwise, or any right whatever, to retain the same in hostility adversely to the claim or demand of the plaintiff. It, therefore, was incumbent on him to show a right to retain them, and a justification of his refusal to deliver them to the plaintiff on his demand thereof. This he undertook to do by

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Opinion of the Commission, per LOTT, Ch. C.

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proving the agreement in question ; which was an undertaking or obligation on his part that the enlisted men should go forward to the place of rendezvous, and that they would not, before reaching there, desert the service. Such an agreement, to be of any validity, must be in writing ; and that in question being verbal only, was not admissible as evidence, and having been given against the exception of the plaintiff was insufficient to give the defendant an interest in the said bonds or any right to retain the possession thereof. (See *Rice v. Peet*, 15 Johns. Rep., 503.)

To overcome the force and validity of that and some other objections urged against the claim of the defendant, the learned judge who tried the issues has found that "the said agreement was fully executed before the commencement of this suit, and nothing remained to be done by either party to consummate and give effect thereto," and in his opinion, to support the finding, he says, "the obvious answer to these suggestions is, that this is not an action upon the agreement. If it was, there might be force in the objection ; but after a party has voluntarily performed an agreement, it is too late for him to urge, either that it was not attended by those formal solemnities to a perfect execution which the law requires, or was not upheld by a sufficient consideration. The party waived all these, even if he might originally have insisted upon them, by doing the thing which he contracted to do ; and his *locus penitentiae*, if he ever had any, has long since passed." This, with all proper deference to the opinion of the learned judge, is not an "obvious answer," but is specious, and does not, in fact, answer the objection. It is true, as he says, that this is not an *action* upon the agreement ; but the whole *defense* of the defendant is based thereon, and without it he was, as before stated, a naked bailee of the bonds, and had no ownership or interest therein, or right to retain the same adversely or in hostility to the demand of the plaintiff. It is the only foundation on which he claims to hold them, and in principle the case is the same as if the defendant was seeking by action to foreclose the plaintiff's right thereto, and bar him from all interest

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Opinion of the Commission, per EARL, C.

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therein, or claim thereto, and upon the judge's own hypothesis there is "force in the objection." Nor is the position that the agreement was "fully executed," and that the plaintiff has "voluntarily performed" it, warranted by the facts. The agreement under which the bonds were deposited, and necessarily including the terms and conditions of the deposit, was entirely executory in its nature and character. It was substantially to the effect that the persons enlisted would not desert the service before reaching the rendezvous, and in default thereof that the bonds, to the amount of \$550 for each man deserting, should be forfeited. The plaintiff has done nothing more than to *make* the agreement. He has not since or subsequent to making it, in any manner performed any act or consented to or acquiesced in anything whatever by which he has relinquished his ownership of the bonds, or any of them, or a right to a return thereof. If he had, *after the desertion* of the men, or any of them, made a settlement or arrangement with the defendant, by which he gave up the bonds or any of them, then there would be ground for holding that he had voluntarily performed the agreement, and that it had been executed to that extent, and he could not afterward set up the invalidity of the contract, originally or in its inception, for the purpose of recovering back those he had so given up.

The views above expressed show that the defendant has failed to establish a right to detain the bonds in question, and, consequently, it is unnecessary to consider the other questions discussed with great ability by counsel on the argument.

It follows that the order appealed from must be affirmed with costs, and judgment absolute must, under the defendant's stipulation, be entered against him with costs.

EARL, C. The defendant was provost marshal of the twenty-first congressional district of the State of New York, and in January, 1865, was engaged in enlisting and mustering men into the military service of the United States, under the call of the president, of December, 1864. Richardson

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Opinion of the Commission, per EARL, C.

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was engaged in furnishing men to fill the quotas of certain towns; and the defendant, as such provost marshal, before he would enlist and muster in the men, required of him the deposit of the bonds, as security that the men presented by him, then and thereafter, and mustered into the military service of the United States, would not desert the service before reaching the rendezvous.

It is claimed by the plaintiff that this pledge of the bonds was taken by the defendant *colore officii*, and hence was illegal and void, and this is the first question which I will consider.

Section 1 of the act of congress, passed March 8, 1863 (12 Laws U. S., 1863, 731), provided that "all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared, on oath, their intention to become citizens, under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States, when called out by the President for that purpose;" and by section 2 of the same act the persons between the specified ages, exempted from military duty, were those who were "physically or mentally unfit for service." By the same act it was provided that a provost marshal should be appointed for each congressional district, with the rank and pay of a captain of cavalry, whose duty it was to arrest deserters and spies and to discharge other duties mentioned in the act. By this and subsequent acts provision was made for the enrollment of the national forces and for drafts; and when the president called for forces and ordered a draft, it was provided that each town should receive credit for all enlistments made on behalf or to the credit of the town for the purpose of filling its quota. The provost marshal was, for each congressional district, an enrolling, enlisting and mustering officer, and also had charge of the drafting of men when a draft was ordered.

It appears that the President, by proclamation issued on

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Opinion of the Commission, per EARL, C.

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the 19th day of December, 1864, had called for more of the national forces, and that certain towns in Oneida county were endeavoring, through Richardson, to fill their quotas, under the call, by the enlistment of men. What then was the duty of the defendant as provost marshal? When the men were presented to him for enlistment, it was his duty to examine them, and if he found them of suitable age and "not physically or mentally unfit for the service," to enlist and muster them into the service and send them to the rendezvous. If he found them qualified as above, he had no discretion to exercise; it was his imperative duty to enlist them. The men were a part of the national forces, and had the right to enlist into the military service of their country from patriotic motives or from mercenary motives for the pay they would get, or to escape an impending draft; and the defendant had no right to exclude them. The towns had the right to fill their quotas by enlistment; and when qualified men were thus presented, the defendant was bound to take them. He had no right to inquire into the moral character of the men, or their moral or physical courage, and reject them because he thought they would desert or run in the face of the enemy. It would be only more reprehensible in degree if he had exacted a bond that they would be true and good soldiers during the entire term of their enlistment. Will it be claimed that he could legally have done this? The obedience and duty of soldiers are not secured in this way, and the government has ample power usually to keep its soldiers after they have enlisted, and to apprehend and punish them when they desert.

In this view of the case, this pledge was illegally exacted and was void as taken *colore officii*. But the result must be the same if we assume that the provost marshal had a discretion whether he would take these men or not for the reason alleged by him. If it was his duty to reject men because he believed they would desert, then he should not have been influenced to take them by any pledge. If he had a discretion to take them or not, then he should have exer-

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Opinion of the Commission, per EARL, C.

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cised his discretion under his oath of office in view of all the circumstances, uninfluenced by the security which he exacted. After these men were enlisted, it was his duty to use all the means at his command to procure their delivery at the rendezvous. If he suspected that they intended to desert, he should have been the more careful and vigilant. How did taking the pledge have any tendency to prevent desertion? It does not appear that these men had any interest in the bonds pledged, or that they were in any way the particular friends or dependants of Richardson; and after they were enlisted he could have nothing more to do with them, as they were then exclusively under the control of the military officers of the government. So far as I can perceive, the only effect the pledge could have was to make the defendant less vigilant in discharging his duty and guarding the men. If he had any faith whatever in the pledge as a security that the men would not desert, its obvious tendency was to cause him to rely somewhat upon it, and not so much upon his zeal and vigilance in the use of other appropriate means. The pledge in fact seems to have had no effect upon the fidelity of the men, as most of them deserted. Hence, in this view of the case, this pledge must be considered as against public policy, and as taken by the defendant *colore officii*.

I have reached this conclusion without considering the fact that the defendant exacted the pledge, not only for such men as Richardson then presented for enlistment, but also for such men as he might thereafter present. If the defendant could exact the pledge because he was satisfied, from his examination, that the men then presented intended to desert, what right had he to exact it for men of whom he knew nothing, and who might be the most faithful and patriotic men in the army? This was an arbitrary exaction not authorized by law nor consonant with public policy; and the contract of security thus exacted is condemned by every authority relating to the subject that can be found in the books.

It is claimed, however, 'by the learned counsel for the appellant, that a security cannot be condemned as taken by

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Opinion of the Commission, per EARL, C.

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a public officer, *colore officii*, unless it was corruptly taken, taken with a corrupt and illegal intent, and that it will not be condemned if taken with good motives and for a worthy object; and this makes it necessary to examine briefly the principles upon which these securities are condemned.

In *Dole v. Bull* (2 John. Cas., 239), it was held that a bond taken by a sheriff for the ease and convenience of a prisoner in execution, so that he might go at large within the walls of the prison, and conditioned that he should remain a true and faithful prisoner, was not a bond for ease and favor, nor void though not taken in the manner directed by the act relative to jail liberties. The decision was put upon the ground that as the sheriff had the right, without violating his duty, to let the prisoner go at large within the walls of the prison, it was not inconsistent with his duty to take such a bond. The court says: "A distinction is taken between bonds conditioned to remain a faithful prisoner, which are lawful, and bonds to save the sheriff himself against escapes, which are held to be illegal and void. The reason appears to be, that the former are consistent with the duty of the sheriff safely to keep his prisoner, and the latter imply the consent of the sheriff to the prisoner's escape as the alternative of an indemnity for the consequences." This is far from an authority that a public officer may legally exact a bond before he will perform a plain duty, or that he may exact a bond that tends to a lax performance of duty. In *Love v. Palmer* (7 John., 160), the action was by an undersheriff upon a bond conditioned to indemnify him against all costs and damages that should arise against him on account of his not taking N. Palmer to prison, on account and by virtue of a *ca. sa.* which he had in his hands, issued out of the Supreme Court, and the defendants bound themselves to pay the debt and costs for which the *ca. sa.* issued, and to indemnify the plaintiff against all costs and damages which should arise from the premises. The plaintiff had the prisoner and *ca. sa.* in his possession when he took the bond, and it was given for the deliverance of the prisoner from custody,

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Opinion of the Commission, per EARL, C.

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although he was not bailable. The bond was held void, as taken *colore officii*, although it was taken for the precise amount for which the prisoner was arrested, without oppression or evil intent, and from humane motives. It was condemned because the plaintiff took it in violation of the duty imposed upon him by law, and without authority of law. In *The People v. Meighan* (1 Hill, 298), a bond, taken by a justice of the peace in a prosecution for bastardy, containing, in addition to the provisions required by law, others imposing further obligations on the obligor, was held to be void as taken *colore officii*. It did not appear that the bond was *exact*ed in the *form* in which it was given, or that it was taken oppressively or corruptly. It was simply not authorized by law, and it was condemned. In *Webbers' Executors v. Blunt* (19 Wend., 188), it was held that a promise to a sheriff to indemnify him against all damages to which he might be subjected in consequence of discharging from custody a third person whom he had arrested on legal process, was void, as taken *colore officii*, although the sheriff was induced to grant the discharge upon false representations of the promissor that the debt, to enforce the payment of which the process had issued, had been satisfied. Here was no oppression and no corrupt intent; and yet in this case Judge Cowen cites the case of *Dive v. Mowingham* (Plowd. Comp., 67), where the action was upon a bond, taken by a sheriff for a previous offence on an execution; and Chief Justice Montague says, "The prisoner not being bailable, the sheriff took the bond unduly, and *colore officii sui*, which is always taken in *malum partem*, and signifies an act badly done under the countenance of an office, and it bears a dissembling visage of duty, and is properly called extortion. Wherefore," he adds, "here, inasmuch as the obligation was made for the deliverance of T. M., who was in the custody of the plaintiff or officer, it cannot be denied but that he took the obligation for his deliverance *colore officii*." Here the learned chief justice was speaking of the manner in which the law characterized the act of taking securities *colore officii*, and he did not mean to say that the officer



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Opinion of the Commission, per EARL, C.

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must actually have had a corrupt or evil intent; as, in the very case he was deciding, the officer did not act oppressively or corruptly, except as he violated his duty. In *Burrall v. Acker* (23 Wend., 606), the chancellor says: "The words color of office necessarily imply an illegal claim of right or authority to take the security or to do the act in question, by virtue of his office, which claim is a mere color or pretence on the part of the officer;" and he quotes from Tomlin's Law Dictionary, that "color of office is where an act is *evilly* done by the countenance of an officer; and is always taken in the worst sense, being grounded upon corruption, to which the office is as a mere shadow or color." The acts described by Tomlin are such as are condemned as done by color of office; but the definition of the term is not broad enough to include all cases, as there are many cases in the books where acts done by color of office have been condemned, although not grounded upon any actual corruption; yet the law may impute a corrupt character to them as done in violation of law. In *Webb v. Albertson* (4 Barb., 51), it was held that a bond taken in the names of the commissioners of highways of a town, for the benefit of the town in its corporate capacity, and intended to relieve the taxable inhabitants of the town from the payment of a tax for a public improvement, viz., the extension and opening of a public highway, could not be enforced against the obligors. The decision was put upon the ground that the commissioners had a plain duty to perform and a discretion to exercise in laying out the road, and that they might be influenced in the discharge of their duty by the bond. It was conceded that they acted from honest motives, and yet it was held that they exceeded their authority in taking the bond, and that their act must be condemned as against the general policy of the law. In *Winter v. Kinney* (1 N. Y., 365), it is said that the policy of the law in declaring void agreements and securities taken by public officers, *colore officii*, is to guard against official oppression on the one side, and a lax performance of duty on the other. Judge WRIGHT, writing the opinion of the court, cites the

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Opinion of the Commission, per EARL, C.

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definition of color of office given by Tomlin; but the very case he was considering was one where a deputy sheriff arrested the plaintiff, in a civil action, on Saturday evening, and the plaintiff agreed with him that if he would become his bail until Monday morning, he would deposit with him the amount for which he was required to give bail, and in case he failed to surrender himself to the deputy on Monday morning, or settle with the plaintiff in the suit against him, then that the deputy should pay the money over to such plaintiff. He made the deposit, and it was claimed to have been forfeited, and was paid over to the plaintiff in the action. He sued to recover the money back on the ground that it was taken by the deputy *colore officii*; there was no oppression, no evil intent and no corruption, and the deputy seems to have acted from humane motives.

Without citing or examining more cases, I think I may safely say that no case entitled to weight as authority can be found, which decides that a security taken *colore officii* cannot be condemned unless it was taken with an evil or corrupt intent. The acts of public officers in taking such securities are condemned because they are against the general policy of the law. It matters not that the motives of the officer were good and humane if the acts are of such a character as tend, if countenanced, to oppression or a lax performance of official duty. In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The laws look to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate. (*Atchesen v. Mallen*, 43 N. Y., 147.)

We are reminded, on the part of the appellant, that there is no law of the United States prohibiting the taking of this pledge, and that our statute, as to securities taken *colore officii* (2 R. S., 386, § 59), is not applicable to officers of the United States. This is undoubtedly true, but the statute of our State mostly, if not to its full extent, embodies principles

## Opinion of the Commission, per EARL, C.

of the common law, and it is important in this case only as indicating what the public policy is. My conclusion, upon this branch of the case, is based upon principles of public policy as sanctioned by the common law and expounded by the ablest jurists.

It is further claimed that if this contract of pledge was illegal and void for the reasons stated, the parties were in *pari delictu*, and that the contract was so executed that the plaintiff cannot recover; and this claim must be briefly noticed.

No case has been cited in which it has been held that where an officer receives securities or money *colore officii*, the parties are in *pari delictu*; and none, I apprehend, can be found. On the contrary, there are cases to be found in the books where money extorted by public officers *colore officii* has been permitted to be recovered by the parties paying, as money had and received. In *Winter v. Kinney*, *supra*, where the question was under consideration, it was not intimated that the defendant could hold the money paid him, because the parties were in *pari delictu*. The oppressor and oppressed are never upon a footing of equality. Both the statute and the common-law prohibition are aimed at the public officer, and are intended to regulate his conduct. He is the one, and not the person yielding to his exaction, who is at common law liable to be indicted for extortion. The law points out the offender, and in such a case the parties are not in *pari delictu*. (*Oneida Bank v. Ontario Bank*, 21 N. Y., 496; *Sackett's Harbor Bank v. Codd*, 18 N. Y., 240; *Statesburgh v. Smith*, 2 Burrows, 924; *Clerk v. Shee*, Cowp., 200.)

Neither was this an executed contract. These bonds were pledged as a security that the soldiers would not desert. The pledge was by the agreement of the parties, and the law implies that the pledgee may hold the property pledged as security, and that in case of forfeiture, he must, by sale, after notice to the pledgor or by action, foreclose the pledge; and until that be done, the legal title to the property remains in the pledgor, and the transaction is *in fieri*. If this con-

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Opinion of the Commission, per EARL, C.

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tract was fully executed, then the pledgee would have nothing more to do except to hold the bonds as his own, and this will not be claimed.

There is another ground upon which the plaintiff's title to these bonds can be upheld. The contract pledging the bonds was without consideration. Richardson was simply an agent for the towns whose quotas he was filling. It does not appear that he was to have any profit whatever from the enlistment of the men, or that he was in any way to be personally benefited by their enlistment. The bonds did not belong to the towns nor to the men enlisted. The defendant parted with nothing on the faith of the pledge, and did nothing which he was not bound by law to do without it. There was no benefit to the pledgor nor harm to the pledgee, and hence there was no consideration.

The defendant had no authority, either in the law, or, so far as appears, in instructions from his superior officers, to take this pledge; and his act has never been ratified by the government. The fact that he notified his superior officer that he had taken it alone, shows no ratification. Besides, he was not the agent of the provost marshal-general, but an agent of the government of the United States; and an act like this, wholly unauthorized by law, could not probably be ratified by any officer of the government. Who, then, shall hold these bonds? The defendant does not claim that he can hold them for his individual benefit. The government has never ratified his unauthorized act, nor, so far as appears, claimed the bonds; and if the plaintiff cannot recover them they will be without an owner.

Two cases were cited in behalf of the defendant, bearing upon this branch of the case, which I will briefly notice. In *Harp v. Osgood* (2 Hill, 216), the plaintiff, as agent of Lee, took in his own name an unauthorized security, and it was held that Lee, as principal, could ratify the act of his agent and enforce the security in the name of his agent. As the agent had no personal interest in the security, it was said that it would have been void without the ratification of the

## Statement of case.

principal, for the want of consideration. In *State of N. Y. v. City of Buffalo* (2 Hill, 434), the keeper of the State arsenal at Batavia loaned to the city of Buffalo 200 guns belonging to the State, and took a bond that they should be returned when called for. It was held that this keeper was not a State officer, but the mere agent of the commissary-general, and that while he was wholly unauthorized to make the loan and take the bond, and that thus the city had obtained and used the guns wrongfully, the State could waive the tort, affirm the loan and sue upon the bond for the value of the guns. Before either of these authorities could have any bearing upon this case, it would have to appear that the government of the United States had, in some way, adopted or ratified the act of the defendant in taking the pledge.

Having thus given this case the careful consideration its importance deserves, I have reached the conclusion that the order of the General Term should be affirmed, and that judgment absolute should be rendered against the defendant, with costs.

All concur.

Judgment accordingly.

EDWARD BECK, Respondent, v. FREDERICK A. SHELDON et al.,  
Appellants.

In an action tried by the court, or by a referee, a refusal to find a material fact, of which there is legal proof, and where there is no proof to the contrary, nor proof of facts or circumstances showing its improbability, is an error of law, and if a request so to find is made and there is a refusal and exception, a proper question is presented for consideration in the Court of Appeals.

Where a manufacturer of goods, which are known in the market, and the different qualities distinguished by numbers, contracts to sell and deliver goods from his factory, of certain numbers, in an action upon the contract it is not material whether the goods delivered are of equal or inferior quality to those of corresponding numbers, manufactured at other factories, or whether they are or are not merchantable. If they are the numbers contracted for as manufactured at the contractor's factory, the contract is fulfilled.

48	365
108	391
48	365
118	268

48	365
130	480
48	365
149	604

48	365
j163	519
48	365
167	57

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Statement of case.

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In executory contracts for the sale of personal property, if the vendee deems the article received not the one contracted for, to preserve his rights he must return it to the vendor, or notify him of his objections and offer to return it. The retention of the property, without doing this, after opportunity to ascertain the defect, is an admission that the contract has been performed.

(Argued September 29, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court of the second judicial district, affirming a judgment in favor of plaintiff, entered upon the decision of the court upon trial without a jury.

This was an action to recover the balance due upon a sale of iron. On the 6th of February, 1864, the plaintiff contracted to sell and deliver to the defendants "800 gross tons Poughkeepsie foundry pig iron, at forty-five dollars per ton for No. 1, and forty-four dollars per ton for No. 2; cash on delivery at wharf at Poughkeepsie." Plaintiff was the manufacturer of iron known in the market as No. 1 and No. 2 Poughkeepsie foundry pig iron. The deliveries were to be made monthly, ending with October. The iron was all delivered and used, and all paid for, except that required to be delivered in October; none was returned or offered to be returned. The defendants insist upon damages and a deduction, on account of the poor quality of the iron delivered. Various requests were made and exceptions taken, which are stated in the opinion of the court. The justice before whom the cause was tried without a jury, found for the plaintiff for the contract price of the iron.

*W. A. Beach* for appellants. It is the duty of the trial court, when requested, to find every material fact necessary to the determination of the issues. (*Carter v. Shipman*, 35 N. Y., 533, 542; *Grant v. Morse*, 22 id., 323-325.) A refusal to find a material fact, proven by uncontroverted evidence, is reviewable here upon proper exceptions. (*Mason v. Lord*, 40 N. Y., 476, 484; *Putnam v. Hubbell*, 42 id., 106; *Marvin v. Inglis*, 39 How., 329; *Fellows v. Northrup*,

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Opinion of the Commission, per HUNT, C.

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39 N. Y., 117; *Draper v. Stouvenel*, 38 id., 219.) An acceptance does not work an estoppel where the defect is latent. (*Hoe v. Sanburn*, 21 N. Y., 552.) The purchaser may protect himself by notice of the defect when discovered. (29 N. Y., 362, 363.) On sales otherwise than by samples a vendee has no right to return for breach of warranty. (*Muller v. Eno*, 14 N. Y., 597; *Gillespie v. Torrance*, 25 id., 306-310.)

*John Thompson* for respondent. Findings of fact are not reviewable in this court. (*Boost v. Spelman*, 4 N. Y., 284; *Pratt v. Foote*, 9 id., 463; *Western v. Genesee Ins. Co.*, 12 id., 258; *Griscom v. Mayor*, id., 586; *Horton v. Brown*, 13 id., 587; *Wright v. Douglas*, 7 id., 564; 14 id., 310; 18 id., 573; 17 id., 31; 22 id., 323, 426; 26 id., 82; 30 id., 383; 33 id., 587; 39 id., 350.) No warranty can be implied in contract in question. (*Hargous v. Stone*, 5 N. Y., 86; *Wright v. Hart*, 18 Wend., 448; *Moses v. Mead*, 1 Den., 378.) Even knowledge of the agent that the iron was wanted for stove plate would not imply a warranty. (14 J. R., 316; *Prentiss v. Dike*, 6 Duer, 220.) Nor his expressing his judgment or opinion. (20 J. R., 191; 10 Wend., 411; 22 Barb., 134.) In executory contracts, if article is not the one contracted for, the vendee must notify the vendor and offer to return. If kept and used, all defect is waived. (*Reed v. Randall*, 29 N. Y., 357; *Hargous v. Stone*, 1 Seld., 86; *Fitch v. Carpenter*, 43 Barb., 40; 20 Wend., 61; *Parsons on Cont.*, 326, 327.)

HUNT, C. The questions made by the appellants are principally questions of fact. Ordinarily, these are not the subject of inquiry in this court, where the judgment has been affirmed at the General Term. The appellants' request to the judge to find certain facts was refused. These facts, they insist, were established by uncontradicted evidence. To the refusal so to find they excepted, and they insist before this court that such refusal constitutes a ground of error. It is

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Opinion of the Commission, per HUNT, C.

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provided by section 268 of the Code, that where there is a trial before a judge without a jury, either party may except to a decision on a matter of law arising on the trial, may make a case or exceptions, and move for a new trial at the General Term. "And either party desiring a review upon the evidence, either of the questions of fact or of law, may make a case or exceptions in like manner as upon a trial by jury, except that the judge must briefly specify the facts found by him, and his conclusions of law." If the judgment be reversed at the General Term \* \* \* the question whether the judgment should have been so reversed, either upon questions of fact or of law, shall be open to review by the Court of Appeals. (Id., 1.) Section 348 provides that an appeal may be taken to the General Term from a judgment entered upon the report of referees or the direction of a single judge of the same court, in all cases, and upon the fact when the trial is by the court or referee.

It will be perceived that the power of this court is less extended than that of the General Term of the Supreme Court, in at least one important particular. Where there has been a trial before a referee or a judge without a jury, the case can be brought before the General Term for "a review of the evidence appearing on the trial." The "questions of fact" can then "be reviewed," that is, the decisions reached upon questions of fact by the judge or referee are open to examination or review or reconsideration by the General Term. This power is expressly denied to the Court of Appeals, except in a single case, viz., where the judgment of the judge or referee is reversed on questions of fact, and it is so stated in the judgment of reversal. (Section 268.) "In that case, the question whether the judgment shall have been reversed either upon questions of fact or of law shall be open to review by the Court of Appeals." (Id.) Where the judgment of the referee or judge has been affirmed by the General Term, or where it has been reversed on questions of law only, this court has no power to review the facts.

It has been held by the Court of Appeals in many cases



## Opinion of the Commission, per HUNT, C.

that it is an error of law for a judge or referee to find the existence of a fact of which there is no evidence. Being an error of law rather than of fact, it is reviewable in this court, and judgments are frequently reversed for the reason that material facts are found of which there is no legal proof. (*Putnam v. Hubbell*, 42 N. Y., 476; *Fellows v. Northrup*, 39 id., 117; *Draper v. Stouwenel*, 38 id., 219.)

A refusal to find a material fact of which there is legal proof, and of which there is no proof to the contrary, and where there are no facts or circumstances showing its improbability, is equally an error of law. If the request so to find is made, and there is a refusal and exception, a proper question is presented for consideration in the Court of Appeals. I do not find that this point has ever been distinctly decided. It has been alluded to, and it seems to me to be within the spirit of the decisions and of the Code. (*Mason v. Lord*, 40 N. Y., 476; *Putnam v. Hubbell*, 42 id., 106; *Grant v. Morse*, 22 id., 323; *Marvin v. Ingles*, 39 How. Pr. R., 329.)

The present case presents sixteen requests for findings, and thirty exceptions to the findings and to the refusals to find. A settlement of the principles in contention will dispose of a large part of these questions. The plaintiff insisted that "Ponghkeepsie foundry pig iron No. 1 and No. 2" called for iron of the qualities of No. 1 and No. 2, as manufactured at that establishment; that these terms represented the comparative softness or hardness of the iron so manufactured, not an absolute quality by a fixed standard, and that it involved no statement of what it would produce when manufactured.

The defendants, on the contrary, insist that the terms used represent known market qualities of iron, and that the iron delivered was inferior to those qualities. In their answer they also insist that it was agreed that the iron should be suitable for the purposes to which they intended to apply it, to wit, the manufacture of stoves, but that it was of an inferior quality and was unfit for the manufacture of stoves.

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Opinion of the Commission, per HUNT, C.

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The judge finds as a fact that the writing contains the only contract in respect to the iron and the whole of it. He further finds that the plaintiff made no warranty or representation of what sort of castings or work the Poughkeepsie pig iron would produce. These findings are sustained by the evidence. The writing speaks for itself. The evidence of Mr. Greene, the defendant, of what took place between himself and the plaintiff's agent, is much more than balanced by the evidence of the agent to the contrary, and the evidence to be derived from the plaintiff's letters, that they formed their judgment of the iron from their use of it in their manufactory. The last branch of the defense requires no further comment. The other branch is to be determined by the writing itself and by the surrounding facts. The plaintiff owned the foundry referred to. He manufactured there iron known as No. 1, and iron known as No. 2. This fact was known to the defendants. They contracted with the plaintiff for 800 tons, not of No. 1 and No. 2 iron generally, but for iron known as Nos. 1 and 2 of the Poughkeepsie furnace. Whether it was good or poor, hard or soft, would make good stove castings or poor ones, was not at all in question. Whether it was as good as the iron made at other factories, whether it was above or below the average, was not important. It was as if they had contracted with a farmer for 800 bushels of the yellow corn to be raised on his farm in a certain town, or 800 bushels of the winter wheat to be raised on a particular lot, or the apples from the trees in his orchard. Such a contract assumes that the parties know what is the character of the article to be there produced. They select a particular standard, and do not rely, either upon its merchantable character or upon its productive quality. If the particular iron, corn, wheat or apples thus to be produced is furnished to the buyer, the contract is performed. The judge found that the iron delivered was precisely the article contracted for; whether it was or was not merchantable, was therefore of no importance.

There was no contract that the iron to be furnished would

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Opinion of the Commission, per HUNT, C.

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produce castings of a particular quality. Such is the finding, based upon sufficient evidence. This, however, is not the only cause of complaint by the purchasers. They allege, and the judge has found, that when mixed in the proportion of two-thirds No. 1, and one-third No. 2, the result did not furnish as good stove plates as did the same mixture in a previous year. But the seller did not agree that the result would be the same. He did not hold forth or represent that the plates of the two years would be the same. The buyers, it may be assumed, believed that such would be the case, but they obtained no guaranty or representation to that effect from the sellers. The failure is, therefore, their loss, and they cannot throw it upon the seller.

It is said that the fracture showed a grain or crystallization, and a character of iron which was not sustained by its result when smelted. So the judge finds, and such was the evidence. He finds also that the only contract was, that Poughkeepsie pig iron Nos. 1 and 2 should be furnished, and that the pig iron, according to the contract, was duly delivered by the plaintiff to the defendants. There was, therefore, no contract either that iron should produce particular results when smelted, or that the actual result should be the same with that indicated by the fracture. On this point, also, the defendants acted upon their own judgment, receiving neither guaranty or representation from the seller. If their expectations are not realized they must themselves bear the loss.

When the judge found that the plaintiff had delivered precisely the article he had contracted to sell, this embraced a finding that he had delivered iron from the Poughkeepsie foundry. It can scarcely be said, with propriety, that he refused to find on this point. He finds that the Poughkeepsie iron works included two stacks at Poughkeepsie and one at Falkill, and that the latter was a part of the works of the Poughkeepsie foundry. The proof showed, also, that the same parties conducted the whole works.

If these particulars are borne in mind there will seem to

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Statement of case.

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The plaintiff did not warrant that the iron was fit for any particular purpose, or that it was of any particular quality.

If we assume that the plaintiff was bound to deliver merchantable qualities of Nos. 1 and 2 pig iron, it does not aid the defense, as there was no proof, certainly no uncontroverted proof, that the iron delivered was not merchantable. It would not make good stoves when mixed in the proportions of two-thirds of No. 1 and one-third of No. 2. And yet there is no proof that it would not make good stoves when mixed with other iron, or that it was not very useful and valuable for many other purposes besides the manufacture of stoves.

The justice who tried the cause having found the making of the contract, and that the plaintiff had fully performed it on his part, found all that it was important for either party that he should find; and his conclusion of law is fully sustained by the findings of fact and the evidence.

The judgment should, therefore, be affirmed, with costs.

All concur. Lorr, Ch. C., not sitting.

Judgment affirmed.

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JOSEPH GILLOTT, Respondent, v. RICHARD ESTERBROOK et al.,  
Appellants.

A manufacturer has the right to distinguish the goods manufactured by him by any peculiar mark or device he may select and adopt, by which they may be known as his in the market; and he is entitled to the protection of a court of equity, in the exclusive use of the peculiar marks or symbols appropriated by him, designating or indicating the true *origin or ownership* of the article to which they are affixed.

Plaintiff, a manufacturer of steel pens, had for many years manufactured a peculiar pattern on which was impressed the figures "303," and the words "Joseph Gillott, extra fine." The pens were put up in paper boxes, with a label on top, containing the same name and numerals. The pens were known and ordered by dealers as "303" pens. Such figures did not express any quality or size of the pen, but were selected arbitrarily by plaintiff to distinguish the pattern or character of pen to which it was applied.

## Statement of case.

Defendants began the manufacture and sale of a steel pen, closely resembling plaintiff's pen in every particular, on which was stamped "303," and "Esterbrook & Co., extra fine." The pens were put up in boxes of the same size and similar to those of plaintiff, with a label containing the same words and figures, except "Esterbrook & Co." instead of "Joseph Gillott."

In an action brought by plaintiff to restrain defendants from using the figures "303" upon these pens and boxes,—*Held*, that plaintiff had acquired the right to the exclusive use of those figures as a trade mark, and was entitled to the relief sought.

(Argued September 29, 1871; decided January Term, 1872.)

APPEAL from a judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment entered on the decision of the court on a trial at Special Term.

The action was brought by the plaintiff to restrain the defendants by injunction, among other things, from using the number "303" on steel pens manufactured by them, and on small paper boxes in which they are put up, on the allegation in his complaint that he had for sixteen years and upwards kept on sale and sold a particular kind and style of pen, made by him, and put up in boxes imitated by the defendants, having the said number "303" impressed on the said pen, and placed on such boxes, with the plaintiff's name as his trade mark.

The material facts sufficiently appear in the opinion. The case is reported below in 47 Barb., 455.

Judgment was rendered restraining the defendants from infringing or using the said trade mark of the plaintiff, and from making or selling pens with said number "303" impressed thereon, or on the boxes or packages containing the same for sale.

*John Sherwood* for the appellants. No one can appropriate a word in general use as his trade mark and restrain others from using it. (*Corwin v. Daly*, 7 Bos., 222; quoted in *Upton on Trade Marks*, 198; *Burnett v. Phalon*, 12 Abb. Pr., 186; 4 Bos., 622; *aff'd* in Ct. of Ap., 5 Abb. Pr. N. S.,

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Opinion of the Commission, per LOTT, Ch. C.

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212; 3 Keyes, 594.) Words and figures indicative of the "kind, character or quality" of the thing cannot be used exclusively as a trade mark. (Upton on Trade Marks, 208, 209; *Gillott v. Esterbrook*, 47 Barb., 479.)

*F. R. Sherman* for the respondent. This court will not review the findings of fact. (*Marshall v. Smith*, 20 N. Y., 251; *Loeschick v. Baldwin*, 38 id., 326; *McCabe v. Brayton*, id., 196; *Fellows v. Northrop*, 39 id., 117; *Ostrander v. Fellows*, id., 305, and authorities cited.) Single letters and figures as well as words may be adopted as a trade mark. (*Newman v. Alvord*, 49 Barb., 589 [1867], Cement case; *Stokes v. Landgraff*, 17 id., 612; *Blois v. Bloomer*, 23 id., 609; *Clark v. Clark*, 25 id., 79; *Brooklyn W. L. Co. v. Masury*, 25 id., 418; *Howard v. Henriques*, 3 Sand. Sup. C. R., 727; *Burnett v. Phalon*, Court of Appeals, 1867, 5 Abbott's R., N. S., 212.) The use of the figures 303 was an infringement, although defendants used their own firm name. (*Goult v. Aleplogha*, 25 Am. Jur., 277; *Seizo v. Provezende*, 14 Law Times, 315; *Newman v. Alford*, 49 Barb., 589; *Burnett v. Phalon*, 5 Abb. N. S., 212.)

LOTT, Ch. C. A manufacturer has the right to distinguish the goods manufactured by him by any peculiar mark or device he may select and adopt, by which they may be known as *his* in the market, and thereby secure to himself the profits arising from the fact that they are of his manufacture, and he is entitled to the protection of a court of equity in the exclusive use of the peculiar marks or symbols, appropriated by him, designating or indicating the *true origin or ownership* of the article to which they are affixed against the adoption or imitation thereof by another, so as to mislead the public as to such origin or ownership, and thus effect the sale of his goods as those of the party whose trade mark is so adopted or imitated.

See *Burnett v. Phalon* (3 Keyes' Rep., 594), and the cases there cited, and particularly the opinion of DUEK, J., in

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Opinion of the Commission, per LOTT, Ch. C.

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that of the *Amoskeag Manufacturing Company v. Spear* (2 Sand. S. C. Rep., 599), in which the question is examined with great ability, and the rules applicable to it are clearly defined.

Upon the application of the above principles to this case, the facts found by the judge, who tried the issues therein, entitled the plaintiff to the relief granted to him by the judgment rendered at Special Term. They show that he had, for many years prior to the commencement of this action, manufactured at Birmingham, in England, and sent to the United States for sale, steel pens of various descriptions, and among them, as early as in the year 1839, one of a peculiar style or pattern, on which was impressed the number "303" and the words "Joseph Gillott, extra fine." The said number was so impressed in said pen by the plaintiff before it had been used by others to distinguish such pattern or character of pen from other patterns made by him, and was adopted and used by him as his trade mark for said pen in connection with his name and the words "extra fine," and it had become established and well known as such. The said figures were selected arbitrarily by the plaintiff, and of themselves expressed no quality or size of the pen, and no other pens were then used which had said numerals impressed thereon. Since the year 1842 the said pens have been put up in block paper boxes holding one gross each, on the top of which is a label, in the centre whereof is the plaintiff's name in larger letters than other prints thereon, and above the name is "No" (meaning number), and below it in large and conspicuous type are the said numerals "303." This pen so marked had become well known to the trade and dealers as a valuable and popular pen; it was in great demand and the most prominent in the market, producing large sales at prices from twenty-five per cent to one hundred per cent higher than the pens made in imitation thereof, or of other pens with the same mark or number "303." It was known and ordered by stationers and other dealers by its said

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Opinion of the Commission, per Lott, Ch. C.

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number "303" to distinguish it from other pens made by the plaintiff of other patterns and descriptions.

It is also shown by those findings that the defendants, except Richard Esterbrook, Jr., under the name of R. Esterbrook & Co., are manufacturers of steel pens at Camden, New Jersey, where they commenced the business in 1859 or 1860; that they manufacture and sell a pen which, in size, shape, color, pattern, flexibility and fineness of point so closely resembles the said pen of the plaintiff as to require an expert or adept to distinguish them in those respects; that they have also impressed upon their said pen, in the same place as upon the plaintiff's said pen, the said numeral "303," and the name of the defendants' firm, "Esterbrook & Co.," and the same words, "extra fine," as upon the said pen of the plaintiff; that they also put up their pens in paper boxes of the same size and similar in other respects to those of the plaintiff, and with the same words printed on the label as on his, except the name, which is "Esterbrook & Co." instead of "Joseph Gillott," and above the name on the label, in like manner as on the plaintiff's, is the word "No." and below the name, equally or more conspicuous than on the plaintiff's, are the numerals "303." There is the word "caution" on the bottom of the boxes of both the plaintiff and the defendants; the object of each, in different terms, is to call the attention of the public to the merits of their respective pens. The said defendant, Richard Esterbrook, Jr., was the agent of the other defendants for selling their pens in the city of New York. It is further found by the judge "that the said use by the defendants of said numerals "303" was with a knowledge by them of the rights of the plaintiff to the same, and with the intent to obtain for themselves the profits and advantages to which the plaintiff was exclusively entitled in the use of his said trade mark, and to mislead the public and defraud the plaintiff in that respect."

The preceding statement of facts clearly shows that the said number was selected and used by the plaintiff as his trade mark, to indicate, in connection with his name, the



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Statement of case.

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origin and ownership of the said pens so manufactured by him, and not to designate their quality merely, and that the defendants, by the adoption thereof, have done it in fraud of his rights, and the plaintiff upon all the facts found by the judge was entitled to the injunction granted to him.

It is, however, claimed by the defendants that the plaintiff has knowingly permitted his said trade mark to be used by other manufacturers for many years, without interference, and that he has thereby lost the right to the exclusive use thereof. This claim is not sustained or in any manner warranted by the findings of the judge. He does indeed find that after the said trade mark had been adopted by him, and the same had been established and become well known as such, that stationers and others in the city of New York had, for fifteen years before the trial of this action, advertised and sold pens similar in appearance as "303 extra fine pens," and as "manufactured under their own superintendence," when in fact they had procured them to be manufactured for them in Birmingham, England, or by the defendants in this country; but he expressly finds "that the plaintiff had no knowledge of said practice, and did not authorize or acquiesce in the same." He is, consequently, not affected thereby. It follows, from the views above expressed, that the judgment appealed from should be affirmed with costs.

All concur, LEONARD, C., not sitting.

Judgment affirmed.

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HENRY LUDWIG, Appellant, v. THE JERSEY CITY INSURANCE COMPANY, Respondent.

Defendant issued to plaintiff a policy of insurance, covering his stock of goods on the first floor of the building, No. 39 Centre Street, N. Y. Prior to the expiration of the policy, plaintiff removed the goods and business to an upper story in the same building. Defendant, with full notice of the change of location, received the premium for renewal, and issued a renewal receipt referring to 39 Centre street, and to the former policy, but expressing in itself no restriction to the first floor. The property being destroyed by fire in an action to recover the amount in-

## Statement of case.

sured,—*Held*, that it must be presumed the company intended to give a valid insurance, as to presume the contrary would be to impute a fraudulent intent; it also intended plaintiff to understand he had received such an insurance. The contract of re-insurance, therefore, will be construed as covering the goods in the new location, and in this respect modifying the original contract.

(Argued October 3d, 1871; decided January Term, 1872.)

APPEAL from an order of the General Term of the Supreme Court, in the first judicial district, setting aside a verdict in favor of the plaintiff, and ordering a new trial.

Defendant issued to plaintiff a policy of insurance, dated May 21st, 1863, by which it insured him against loss or damage by fire, to the amount of \$2,000, on his stock of books, \* \* paper stock, stereotype plates stored, but not in use, and on the store fixtures, all contained in the first story of the five-story brick building situated at No. 39 Centre street, in the city of New York.

On the first of May, 1864, plaintiff vacated the first story of said building, and moved his business up stairs.

After that period none of the plaintiff's property remained in the first story.

After he had moved his place of business and property up stairs, the agent of the defendant called upon him about the 21st of May, 1864, and was informed by the plaintiff that he had moved up stairs. The agent said, "I see you are."

At this interview the plaintiff paid to the defendant's agent the premium for the renewal of insurance for the succeeding year, and defendant's agent gave to plaintiff a receipt, in these words:

"On Stock.

"Premises—39 Centre Street, city of New York.

"Office of Jersey City Insurance Company,

"Jersey City, 21st May, 1864.

"No. 26,954.—Received of Henry Ludwig, thirty dollars, being the premium on two thousand dollars insured under policy No. 21,863, which is hereby continued in force for one

## Statement of case.

year—to wit: from the twenty-first day of May, 1864, until the twenty-first day of May, 1865, at noon.

“J. PALMER,  
“Secretary.”

On the 9th of December following, a fire occurred, by which plaintiff's property was destroyed. The only question raised upon the trial was as to whether the policy covered the property destroyed.

*John E. Burrill and J. F. Malcolm* for the appellant. The court will construe the undertaking so as not to render it nugatory. (*Richardson v. Waring*, 39 Barb., 45, 47; *Kunzee v. A. E. Fire Ins. Co.*, 41 N. Y., 412.) For this purpose the court will look at the extrinsic facts. (Greenl. Ev., 317, 327; *Blossom v. Griffin*, 13 N. Y., 569; *Bancroft v. Winspear*, 44 Barb., 209.) The court will interpret the language in the sense used by the parties, and with reference to the state of things then existing. (*Liddle v. Market Ins. Co.*, 4 Bosw., 174; *Mayer v. Exchange Ins. Co.*, 3 Keyes, 436.) Other cases to the same point: (*Bidwell v. N. W. Ins. Co.*, 24 N. Y., 302; *Agawam B'k v. Strever*, 18 N. Y., 509; *French v. Carhart*, 18 id., 102.) Verbal notice of the change was sufficient. (*McEwen v. Montgomery Ins. Co.*, 5 Hill, 101; *Liddle v. Market Fire Ins. Co.*, 4 Bosw., 179; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y., 253; *Smith v. Gagerty*, 4 Barb., 614.) Even with provision that notice should be in writing, it was competent to the defendant to waive that provision. (4 Bosw. R., 179; 14 N. Y. R., 253.) Defendant did not ask that any question should be submitted to the jury, and if the court, by directing a verdict, determined some question incorrectly, it cannot now raise the objection. (*Marine Bank v. Clements*, 31 N. Y. R., 38, 43; *Dows v. Rush*, 28 Barb., 180; *Mallory v. Tioga Co.*, 3 Keyes, 356; *Barnes v. Penire*, 12 N. Y., 18, 23; *Winchell v. Hicks*, 18 id., 558.) Neither can a question now be raised as to the authority of the agent. (*Sipperly v. Stewart*, 50 Barb., 62.)

## Opinion of the Commission, per HUNT, C.

<sup>1</sup> *John M. Scribner, Jr.* for the respondent. The location of the goods insured constitutes an essential consideration, and the contract must be construed according to its precise terms. (Ellis on Ins., 12; *N. Y. Gas-light Co. v. M. Fire Ins. Co.*, 2 Hall, 108; *Brown v. Cattaraugus Mutual Insurance Co.*, 18 N. Y., 385; *Chase v. Hamilton Ins. Co.*, 20 id., 52; *Boynton v. The Clinton and Essex Mutual Ins. Co.*, 16 Barb., 254.) Any statement in a policy which relates to the risk is a warranty. (*Wall v. The East River Mutual Ins. Co.*, 7 N. Y. 3 Seld., 370; *Fowler v. Aetna Ins. Co.*, 6 Cow., 673.) And even "knowledge by the agent of the insurer of the falsity of the warranty will not relieve from the consequences of a breach." (*Chase v. Hamilton Ins. Co.*, 20 N. Y., 52.) There was nothing in the policy or receipt which can be construed into an insurance upon goods, except in the first story. (*Balt. Fire Ins. Co. v. McGowan*, 16 Md., 47; *Heron v. Peoria M. and F. Ins. Co.*, 28 Ill., 235; *N. E. F. and M. Ins. Co. v. Wetmore*, 32 Ill., 221.) Plaintiff cannot recover in a mere general equity, because of alleged mistake in contract, with a suit to have it reformed. (*Leavitt v. Palmer*, 3 Com., 19.)

HUNT, C. At the close of the evidence, the defendant moved for a dismissal of the complaint upon the ground that the defendant only insured the goods of the plaintiff upon the first floor of the building No. 39 Centre street. This motion was denied, and it is upon this point that the question presented for decision arises. No point was made at the trial that the person to whom notice of the change of location of the goods was given was not a proper person for that purpose. It was not suggested that he had not sufficient authority to receive the notice and to act upon it. No such suggestion can now be made. (*Beals v. Home Ins. Co.*, 36 N. Y., 529.) The case may be stated in this form: The defendant issued to the plaintiff a policy for one year, covering his goods on the first floor of the building 39 Centre street. The year being about to expire, and the goods having, in the meantime, been removed to an upper story of the same

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Opinion of the Commission, per HUNT, C.

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building, the plaintiff gives notice to the defendant of such change of location, pays the renewal premium, and receives a renewal receipt referring to No. 39 Centre street and to the former policy, but expressing, in itself, no restriction as to the first floor of the building. Upon the occurrence of a fire, can the plaintiff recover his damages?

An insurance against loss by fire may be made by parol as well as by writing. (*Fish v. Cottenet*, 44 N. Y., 538.) A written contract of insurance may be modified by parol without the passage of any new consideration to support it. (*Trustees First Baptist Church v. Brooklyn Fire Insurance Company*, 19 N. Y., 305; *Blanchard v. Trim*, 38 id., 225.) Every renewal of a policy constitutes a new contract, and the old contract may be modified in any of its parts at the pleasure of the parties. A contract is to be construed to mean: 1. What its terms plainly express; or 2. What the promisor intended the promisee to understand that it meant. (*Botsford v. McLean*, May, 1870.) Here the insurance had expired, or was about to expire. No loss had been incurred, and no liability existed. Both parties wished the contract to be extended. The plaintiff desired an insurance upon his goods in the upper stories of the building. He had none in the lower story. The company wished to insure him on his goods where they were, not where they were not. Knowing exactly where they were, they receive the compensation for one year's insurance and deliver him the contract before us. I doubt not that they intended to give him a valid insurance, and intended him to believe that he had received such. To suppose otherwise would impute to them a fraudulent disposition, which there is nothing in the case to justify. The parties supposed that the paper delivered reached the case, and intended that it should. We can accomplish this intent by such a construction of the writing. It is as if the defendant had indorsed upon the policy a memorandum that the location of the goods had been changed, or as if notice of that fact had been verbally given and assented to. The con-

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Opinion of the Commission, per HUNT, C.

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tract would then have been for an insurance upon goods on the first floor, modified as to the floor or story. The modification is established in two modes: 1, by the new paper, which, referring to the policy, describes also the goods as being simply in store No. 39 Centre street; and, 2, by the fact that the defendant knew perfectly where the goods were and insured them there, or intended the plaintiff to suppose that it did so insure them. (*Botsford v. McLean, supra.*) If the plaintiff had said to the defendant at its office, I have removed my goods to the third story, I wish to continue the insurance for one year, and had paid it thirty dollars, which it had received, it would certainly have been liable in case of a loss. The reference to the first story in the original policy would have been deemed to have been modified by the notice and the acceptance of the premium. The plaintiff has lost nothing by taking a receipt which, so far as it goes, sustains his view of the case.

The only support of this defence is the position that, when it gave the renewal receipt, the defendant did not intend to make any further insurance. This cannot be sustained without an imputation on its honesty. It knew when it took the premium that something was expected of it. Men do not pay moneys to insurance companies gratuitously, without expectation of benefit or return. It knew, also, that the plaintiff had no property on the first floor to be protected. The only possible alternative is the case claimed by the plaintiff, to wit: that the original contract was understood and intended to be modified by applying the policy to the goods on the upper stories. (*Solnies v. The Rutger Fire Ins. Co.*, 8 Keyes, 416; *Mayor v. Exchange Fire Ins. Co.*, id., 436; *Plumb v. Cattaraugus Co.*, 18 N. Y., 392.)

The order for a new trial should be reversed, and judgment ordered for the plaintiff upon the verdict, with costs.

All concur.

Order reversed and judgment accordingly.

## Statement of case.

GEORGE CARVER, Respondent, v. ALLEN P. CREQUE,  
Appellant.

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The town of W. voted a bounty to each individual who should volunteer and be credited upon its quota under a call of the president. Prior to the town meeting when the bounty was voted, McM. had enlisted and been mustered in as a substitute for defendant, but the latter had paid him nothing. K. paid to McM. the amount of the town and county bounties, and took from him an assignment of his claim therefor. Defendant assented to K.'s right to receive them. Subsequently defendant demanded and received of the supervisor of W. the bonds of the town for the amount of the bounty to McM. In an action by an assignee of K., for an alleged conversion of the bonds,—*Held*, 1st. That the ratification and acceptance by the town of the credit given it by McM.'s enlistment was a sufficient consideration for its promise to pay the bounty, and he and his assigns became thereby legally entitled to the bonds issued therefor. 2d. Defendant having received them without claim of right was liable to an action for their conversion. (The cases of *Patrick v. Metcalf*, 37 N. Y., 332, and *Butterworth v. Gould*, 41 id., 450, distinguished.)

(Argued October 4, 1871; decided January term, 1872.)

APPEAL from order of the General Term of the Supreme Court in the seventh judicial district, affirming an order setting aside a nonsuit, and granting a new trial.

The action was brought to recover damages for the alleged conversion of two bonds of the town of Wolcott, Wayne county. It is reported below (46 Barb., 507). The following facts appeared upon the trial.

Defendant presented to the supervisor of the town of Wolcott a duplicate certificate of the proper mustering officer, that McMahan had been mustered into the service of the United States on the 3d of September, 1864, as a soldier, on an enlistment for three years, under the call of the president for 500,000 men, and had been on that day credited to the said town toward its quota under that call; and the defendant represented that McMahan had been so enlisted, and mustered into the service as a substitute for

## Statement of case.

himself. He requested that the bounty provided by a vote of the town on the 7th of September, 1864, amounting to \$600 for each enlisted man, to be credited on the quota of the said town, should be issued to him. On the 17th of October, 1864, the said supervisor issued and delivered two bonds or obligations of the said town amounting to \$600 to the defendant payable to bearer for and on account of the said enlistment. It also appeared that a special town meeting was called on the 30th of August, 1864, pursuant to chapter 8, of the Laws of 1864, to be held in the said town on the 7th of September then next, to determine whether the sum of \$600 should be paid by the town to each individual who should volunteer to fill the quota assigned to the town under the last call of the president for 500,000 men. The special town meeting was held on the day named, and the proposed resolution was then adopted, and the supervisor of the town was authorized to issue the obligations by which the bounty was to be paid. On the 3d of September, when McMahan, was mustered into the service, L. S. Ketchum paid him \$1,325 in cash for his town and county bounty; and McMahan, in consideration of said sum, assigned to Ketchum in writing his right and title to the said bounties. The defendant knew before the 7th of September that Ketchum claimed the right to receive these bounties and assented to his doing so. McMahan was a substitute for the defendant, but he had paid him nothing. He had paid to Ketchum \$300, with which to procure him a substitute, and this sum Ketchum had refunded to the defendant prior to his said assent. The said obligations issued by the town had been paid, and were in the possession of the supervisor at the trial. There was no dispute that they were of par value. Ketchum assigned his claim to the plaintiff for value received, who, before the commencement of the action, demanded the said bonds from the defendant. He stated that he had sold them or passed them away.

When the plaintiff rested, defendant moved for a nonsuit, which was granted.



## Statement of case.

Upon a motion made upon the judge's minutes, the nonsuit was set aside and new trial ordered.

*Wm. Roe* for the appellant. A part consideration is not sufficient to uphold an express promise, unless done at the request of the party promising. (*Cheffer v. Thomas*, 7 Cow., 388; *Comstock v. Smith*, 7 John., 87; Kent's Com., 617, 618.) An express promise gives no right of action, if the obligation upon which it was founded could not be enforced at law. (*Smith v. Ward*, 13 John., 257; 16 id., 283; 24 Wend., 97; *Watkins v. Hulstons*, 2 Sanf., 311; *Geer v. Archer*, 2 Bar., 420; *Nash v. Russell*, 5 id., 556; *Ingraham v. Gilbert*, 20 id., 151; *Goulding v. Davidson*, 28 id., 438.) To maintain an action of trover, plaintiff must have a general or special property in the chattel claimed. (*Sheldon v. Soper*, 14 John., 352; *McDonald v. Hewitt*, 15 id., 349; *Tuthill v. Wheeler*, 6 Barb., 362; *Thorp v. Burling*, 11 John., 285; *Hendrick v. Decker*, 35 Barb., 298; *Chadwick v. Lamb*, 29 Bar., 518; *Whitcomb v. Hungerford*, 42 id., 177; *Hunt v. King*, 42 id., 658.) The rule is the same in the analogous action of trespass. (*Gardner v. Hunt*, 1 Com., 528; *Putnam v. Wyley*, 8 John., 432; *Aiken v. Buell*, 1 Wen., 466; *Faulkner v. Brown*, 13 id., 63.) A demand and refusal do not establish conversion when the goods are not in possession of the one from whom demanded. (*Whitney v. Slawson*, 30 Barb., 276; *Andrews v. Shattuck*, 32 id., 396; *Bowman v. Eaton*, 24 id., 528.) The bonds having been delivered to defendant under claim of right, an opposing claimant cannot recover of him. (*Patrick v. Metcalf*, 37 N. Y., 332; *Butterworth v. Gould*, 41 id., 450.)

*O. Mason* for the respondent. A subsequent ratification is equivalent to a prior request or authority. (Brown's Legal Max., 676; Story on A., § 445; Ad. on Con., 19; *Doty v. Wilson*, 14 J., 352.) McM. had a legal right of action for the bounty as soon as it was voted. (*Munsell v. Lewis*, 2 Den., 224.) This right passed by the assignment to Ketchum. (*Lars-*

Opinion of the Commission, per LEONARD, C.

rence v. Bayard 7 Paige, 76; Stevens v. Bagwell, 15 Vesey, 139; Parmlee v. Dana, 23 Barb., 461.) Trover will lie wherever an action for money had and received would lie for a tortious conversion. (Graves v. Shipman, 25 Eng. C. L. R., 13; 10 Bing., 5.) The gist of the action is the wrongful withholding of the money K. or his assignee is entitled to. (Wall v. Lancaster Bank, 17 S. & R., 285; Comparch v. Burn, 5 Black., 419; Pierce v. Van Dyke, 6 Hill, 613; Romig v. Romig, 2 Rawle, 241; Alsager v. Close, 10 M. & W., 574; Wigals v. Lord, 1 Cow., 240; Tilden v. Brown, 14 Eq., 164; 1 Smith's Lead. Cases, H. & W.'s Notes, 410.) Although the bonds had no legal inception until issued to defendant, yet defendant, having wrongfully converted them, is liable. (Decker v. Matthews, 2 Ker., 313, 322; Murray v. Johnson, 10 John., 172; Scott v. Jones, 4 Taunt., 365; Harding v. Carter, 1 Park Ins., 4; Sillsbury v. McCann, 3 Com., 379.) Plaintiff having legal title to the bounty, it drew to it the title to the bonds. (Ohio Life Ins. Co. v. Ledyard, 8 Ala., 866; Curtis v. Tyler, 9 Paige, 432; Bro. Trespass, 308; Latch, 214; Wins' Notes to 2 Saund., 47; 3 Phil. Ev., 534.) Sale amounts to a conversion. (Fetherstonehaugh v. Johnson, 4 E. C. L., 8 Taunt., 237.)

LEONARD, C. It is clear from the evidence that the inhabitants of the town of Wolcott intended to raise the money and pay a bounty of \$600 to every soldier who should be enlisted and credited toward its quota, under the call of the government for men to serve in the army. There was no distinction, whether he had been enlisted or should thereafter be enlisted. The only condition was that the enlisted man should be credited on account of the quota assigned to the town under a certain call. McMahon was such a man. The town was legally authorized to grant the bounty. The bounty became thereby his right, and the equivalent of property. The point that there was no consideration, and no obligation, therefore, resting on the town to pay the bounty to McMahon, for the reason that he had enlisted and been

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Opinion of the Commission, per LEONARD, C.

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mustered into the service before the special town meeting had been held, is as destitute of legal merit as it is of morality.

The defendant, by local influence of himself, or his friends, of which it appears by the evidence that he boasted, or by misrepresenting his right to it, and imposing on the credulity of the supervisor, who was charged with the duty of delivering the town bonds, succeeded in diverting to his own pocket the bounty which belonged to McMahon, and to which he had no just claim of ownership or title.

Possibly McMahon, or his assignees, might have compelled the issue of a town bond, or the payment of the money, by a proceeding against the town, or he might have maintained an action against the supervisor, who, without any evidence of the defendant's authority to receive it, voluntarily delivered his bounty to the defendant. McMahon, or his assignee, had his election to pursue the defendant, rather than such other more difficult remedies, where he would be met by other principles of law, and where the defence might be favored if the agents of the town acted with any prudence or good faith in delivering the bounty. As to the defendant, it is plain that he was a wrong-doer, and can have no pretence of good faith. His attempt at a defence is not that he has any title, but that the plaintiff has none. In this respect, he is in error. The enlistment of McMahon must be deemed to have been at the request of the town, to whose quota he was credited; or the town ratified and accepted the credit given and certified by the mustering officer. This constituted a sufficient consideration for a promise to pay for it. The case is within that of *Decker v. Matthews* (2 Kernan's R., 313). The defendant got possession wrongfully of the property of another.

The defendant's counsel supposes that the cases of *Patrick v. Metcalf* (37 N. Y., 332), and *Butterworth v. Gould* (41 id., 450), are in point to save him from liability. The difference is that the defendants in those cases received the money under claim of right. Here there can be no such claim. The bounty was not payable to those who had

Statement of case.

obtained a substitute, but to an enlisted man. The defendant claimed as having succeeded to McMahon's right. Not that he had any right of his own otherwise.

The order setting aside the nonsuit is correct, and should be affirmed with costs.

All concur.

Order affirmed and judgment absolute against defendant, and with costs.

THE PEOPLE ex rel. CHARLES R. WESTBROOK et al., Appellants, v. THE BOARD OF TRUSTEES OF THE VILLAGE OF OGDENSBURGH, Respondents.

By the statutes of this State, assessors are made the judges of the value of property for the purposes of taxation. They are not bound by proof produced before them, but are required to exercise their own judgment notwithstanding such proof, and the case must be an extraordinary one which will authorize the Supreme Court to review their judgment upon certiorari.

If, however, the assessors place upon the roll property not liable to taxation, and they refuse upon the application of the person aggrieved to strike it off, their action can be reviewed upon certiorari.

Where, at the time of the making out of an assessment roll, the agent of a non-resident has moneys belonging to his principal on deposit in bank, it is liable to be assessed and taxed, although, prior to the time appointed for correction of the roll, it has been withdrawn and used.

Money due upon a contract for the sale of lands is personal property, and where such a contract belonging to a non-resident is in the hands of an agent who is a resident of an incorporated village, it may, for the purposes of municipal taxation, be assessed to the agent and taxed.

The provisions of the act "to subject certain debts due to non-residents to taxation" (chap. 371 of the Laws of 1851), providing that debts due from inhabitants of this State to non-residents for the purchase of real estate shall be assessed in the name of the creditor and taxed in the town or county where the debtor resides, is applicable only to taxation in towns; and as to taxation in villages, the general law authorizing assessments to agents (1 R. S., chap. 13, title 1, § 5, as amended in 1851) remains in force.

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## Statement of case.

By the charter of the village of Ogdensburgh (as amended, chap 62, Laws of 1865), in making out the assessment roll the trustees are required to follow the town assessment roll, adding thereto property which has been omitted, etc. The town assessors had assessed one P. for \$50,000 of personal property. He appeared before them and objected to the assessment upon the sole ground that he was a non-resident, and they struck it off. No assessment appeared upon that roll against his agents who had the property under their control. *Held*, that within the meaning of the charter the personal property was omitted and was properly added to the village assessment roll and assessed to the agents.

(Argued October 4, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial district, quashing a common-law writ of certiorari, which was allowed at a Special Term of the Supreme Court, to rescind an assessment against the relators, as agents of George Parish, a resident of Bohemia, made in 1866. The return of the defendants to the writ shows that their predecessors in office made the assessment complained of, and it contains all the proceedings had before the board of trustees, and their action thereon. The leading features of the return and other facts appear sufficiently in the opinion.

*L. Hasbrouck, Jr.*, for the appellants. The property was not assessable to defendants as agents. (*Lord v. Arnold*, 18 Barb., 104; *Hoyt v. Com. of Taxes*, 23 N. Y., 224.) Assessors must decide upon the evidence produced before them, and are bound to follow the statements under oath of the person aggrieved. (*People v. Reddy*, 43 Barb., 539, 543.) The remedy by certiorari is proper. (*Heywood v. City of Buffalo*, 4 Ker., 534; *M. B. Ins. Co. v. Supervisors*, 2 Abb. [N. S.], 233.)

*George Morris* for the respondent. The decision of General Term was matter of discretion, and is not appealable. (*People ex rel. v. Stillwell*, 19 N. Y., 531; *Mt. Morris Square*, 2 Hill, 28.) This question may be raised on argument. (*Peo-*

*ple v. Mayor N. Y.*, 2 Hill, 9; *People v. Supervisors of Alleg.*, 15 Wend., 198; *S. & W. R. R. Co. v. McCoy*, 5 How. Pr. Rep., 378.) The effect of the writ being to restrain the collection of village taxes, it was improvidently granted. (2 Strange, 932; *The King v. King et al.*, 2 T. R., 234; *People v. Supervisors of Allegany Co.*, above; *People v. Supervisors of Queens*, 1 Hill, 200; *People v. City of Rochester*, 21 Barb., 665; *Case of Fifty-first Street*, 3 Abb., 232.) The decision of the trustees as assessors was a judicial determination. (*Alb. & W. S. R. R. Co. v. Canaan*, 16 Barb., 244; *Van Rensselaer v. Cottrell*, 7 Barb., 127; *Same v. Witbeck*, id., 133; *Barhyte v. Shepard*, 35 N. Y., 238; *Swift v. City of Poughkeepsie*, 37 id., 511.) The assessors were not bound by relators' estimate. (*Alb. & W. S. R. R. Co. v. Canaan*, 16 Barb., 250.) The property was properly assessed to relators as agents. (*Hoyt v. Com. of Taxes*, 23 N. Y., 232; *I. L. A. Society v. Com. of Taxes*, 28 Barb., 322.) The court will only look into the return to see if defendants had jurisdiction. (*Alb. & W. S. R. R. Co.*, 16 Barb., 244, 248, 250; *People v. City of Rochester*, 21 Barb., 664; *People v. Stilwell*, 19 N. Y., 532.)

EARL, C. The charter of the village of Ogdensburgh, as amended by chapter 62 of the Laws of 1865, provides that on or before the first day of May, in each year, it shall be the duty of the trustees to prepare an assessment roll of the property in said village subject to taxation, with the valuation thereof as set down in the last preceding town assessment roll, or as the same shall be changed under the authority given in the charter; and to add to such assessment roll any property liable to taxation with the taxable value thereof, which may have come within the corporation since the making of the town assessment roll, or which may have been omitted thereon, and, in their discretion, to reassess any property which, since the making of the town assessment roll, has changed in value. The trustees are clothed with the same power to administer oaths and correct valuations as is given

by law to town assessors, and they may employ a special clerk to do the clerical duty and ascertain unassessed property under their direction; and upon the completion of the roll, they are required to cause notice to be published of a time and place to hear objections. At the time and place specified, they are required to meet and hear objections and correct the roll as the facts may require, and the roll, when so corrected, is declared to be final and conclusive.

The facts contained in the return to the writ cannot be disputed, and must be taken as true.

It has been finally settled that a common-law certiorari to review the proceedings of assessors, brings up the merits as well as questions of jurisdiction and regularity, and that where assessors have neither exceeded their powers, nor been irregular in exercising them, the court will still, upon the facts appearing in the return, examine and correct their decisions if erroneous. (*People v. The Assessors of Albany*, 40 N. Y., 154.) I will, therefore, proceed to examine this case upon the merits.

The return shows that the relators were, at the time the assessment was made, the sole general agents of George Parish, a resident of Bohemia, and that as such agents they had possession and control of "all his real and personal property and estate, debts, dues, choses, claims and demands," in said village and within the county of St. Lawrence; that the trustees assessed them as such agents for \$50,000 of personal property, and that after hearing their objections at the time and place appointed for that purpose they reduced this sum to \$30,000. The relators claimed that the whole amount should be stricken off from the assessment roll, and the first inquiry is, whether they had \$30,000 of taxable personal property in their possession, or under their control. The law makes it the duty of the trustees or assessors, when the property is not upon the town assessment roll, to place a value upon it for the purpose of taxation. They are to search out the property, and place a value upon it, and then place it upon the assessment roll. When they have done this, the roll furnishes *prima*

*facie* evidence that the property is taxable, and its value. After the completion of the roll, they are required to give notice of a time and place to hear objections, and at such time and place they are required to hear proofs and objections, and to make corrections as town assessors are required to.

By section 6 of chapter 176 of Laws of 1851, as amended by chapter 536 of Laws of 1857, it is provided that "whenever any person on his own behalf, or on behalf of those whom he may represent, shall apply to the assessors of any town or ward to reduce the value of his real and personal estate, as set down in the assessment roll, it shall be the duty of such assessors to examine such person under oath, touching the value of his or their said real or personal estate, and after such examination and such other supplementary evidence, under oath, as shall be presented by the party or person aggrieved, they shall fix the value thereof at such sum as they may deem just; but if such person shall refuse to answer any question as to the value of his real or personal estate, or the amount thereof, or present supplementary evidence under oath to justify a reduction, the said assessors shall not reduce the value of such real or personal estate." By this statute the assessors are not bound by the oath taken before them. They are required to hear the proofs, and then to fix the value "at such sum as they may deem just." Where the property is visible, the assessors are supposed to have viewed it. If an oath should be made before them that certain land assessed is worth but \$50 per acre, they may still, if they think it worth so much, assess it at \$100 per acre; or if an oath should be made that personal property is worth only \$1,000, they may still assess it at \$3,000. The statute makes them the judges of the value of property for the purposes of taxation. They are required to exercise their judgment as to its value, notwithstanding any proof that may be produced before them, and the case would have to be a very extraordinary one which would authorize the Supreme Court upon certiorari to review their judgment. Indeed, it would be quite impracticable in most cases for the



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Opinion of the Commission, per EARL, C.

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Supreme Court upon certiorari to correct the judgment of the assessors as to values, and my attention has been called to no case where it has been done.

If, however, the assessors place upon the assessment roll property not liable to taxation; and they refuse, upon the application of the person aggrieved, to strike it off, then their action can be reviewed by certiorari; as if they assess personal property which has its *situs* in another State (*Hoyt v. The Commissioners of Taxes*, 23 N. Y., 224; *People v. Gardner*, 51 Barb., 352), or which is exempt from taxation by the laws of this State or of the United States.

The facts returned show that the relators had in their possession, as such agents, a large amount of household furniture and effects in the mansion of their principal in the village, consisting of silver and plated ware, mirrors, books, pictures, wines, cigars and other articles. A list of these articles seems to have been furnished by one of the relators, with the value of each article set down, and the value of the whole, as estimated by him, is \$5,596. There is no evidence what value the trustees put upon this property. They were also acting under oath, and they may have valued it at a much larger sum. Suppose they valued it at \$10,000 or \$15,000; how could the Supreme Court or this court determine that the one or the other party was in error as to the valuation—all the parties really giving their estimate under oath? We are unable to say, therefore, how much of the \$30,000 was made up or ought to have been made up of this furniture. It also appears that on the first day of May the relators, as such agents, had \$6,000 in money in banks. It matters not that it was subsequently used. It was there when the assessment was made, and was thus liable to be assessed. It may, therefore, be assumed that this \$6,000 was part of the \$30,000. It also appeared that the relators, as such agents, had in their possession contracts for the sale of land amounting to more than \$50,000, less (it is not stated how much less) than \$20,000 of which was for land sold in the town in which the village of Ogdensburgh was situated, and hence we may

assume that nearly \$20,000, on account of these contracts, entered into the said sum of \$30,000. It does not appear, therefore, that the trustees erred in the *amount* at which they assessed the relators; and the only other question to be considered is, whether this amount was properly assessed to them as the agents of Parish. It appears by the return that the town assessors had assessed George Parish for \$50,000 of personal property upon the assessment roll of 1865, and that he appeared before them and objected to the assessment, and that they struck it off upon the sole ground that he was a non-resident of the United States. Upon that roll his agents were not assessed for any of his personal property in their possession or under their control.

By the charter of the village of Ogdensburgh, as above referred to, the trustees are required to prepare an assessment roll of the property in said village subject to taxation, with the valuation thereof, and they are required to follow the town assessment roll, except they may add to the assessment roll property which has been omitted from the town assessment roll, and make certain other alterations specified. The \$30,000 in question was not upon the town assessment roll, and was clearly, within the meaning of the provisions of the charter above referred to, omitted therefrom. It was intended by the charter that no property taxable in the village should escape taxation, and that the last town assessment roll should be the guide in all cases where the property appeared upon it, unless such property had changed in value. But if the property did not appear thereon, either because the same had been for any cause omitted, or had been brought into the corporation since the town roll was made, then the trustees were to add the same to their roll with a proper valuation. Hence the trustees were authorized to add this property to their roll; and the next inquiry is whether any error was committed in assessing it to the relators as agents.

While the charter of the village of Ogdensburgh makes no particular provisions as to the form of the assessment roll,

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Opinion of the Commission, per EARL, C.

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and does not specify what property within the village is taxable, nor how the property shall be assessed, nor to whom it shall be assessed, yet it was clearly the intention of the legislature that in these particulars the general laws in reference to taxation should govern so far as they are applicable.

It is provided by section 1, title 1, chap. 13, part 1 of the Revised Statutes, that all lands and personal estate within this State shall be liable to taxation; and by section 3 of the same title, personal estate is defined to include "all household furniture, moneys, goods, chattels, debts due from solvent debtors, whether an account, contract, note, bonds or mortgage, public stock, and stocks in money corporations." By section 5 of title 2 of the same chapter, as amended in 1851, it is provided that every person shall be assessed in the town or ward where he resides, when the assessment is made, for all personal estate owned by him, including all personal estate in his possession or under his control as agent, trustee, guardian, executor or administrator.

That the furniture in the mansion and the money in the bank were, under these provisions, properly assessable to the relators is not seriously disputed. And I am unable to see why the money due upon the land contracts must not be assessed in the same way. The debts due upon these contracts are personal estate, the same as if they were due upon notes or bonds; and such personal estate may be said to exist where the obligations for payment are held. Notes, bonds and other contracts for the payment of money have always been regarded and treated in the law as personal property. They represent the debts secured by them. They are the subject of larceny, and a transfer of them transfers the debt. If this kind of property does not exist where the obligation is held, where does it exist? It certainly does not exist where the debtor may be, and follow his person. And while, for some purposes in the law, by legal fiction, it follows the person of the creditor and exists where he may be, yet it has been settled that for the purpose of taxation, this legal fiction does not, to the full extent, apply, and that

such property belonging to a non-resident creditor may be taxed in the place where the obligations are held by his agent. (*Hoyt v. The Commissioners of Taxes*, 23 N. Y., 288; *The People v. Gardner*, 51 Barb., 352; *Catlin v. Hull*, 21 Vermont, 152.)

It is claimed, on the part of the appellants, that chapter 371 of the Laws of 1851 has some bearing upon this case. Section 1 of that act provides that "all debts owing by inhabitants of this State to persons not residing within the United States, for the purchase of any real estate, shall be deemed personal property within the town or county where the debtor resides, and as such, shall be liable to taxation in the same manner and to the same extent as the personal estate of citizens of this State." The remaining sections of the act provide for the assessment, in the name of the non-resident creditor, of these debts in the towns of the county where the debtors reside; and also provides a peculiar mode for the collection of the tax.

Without this act, all these debts would have to be assessed in the town where the agent of the creditor holding the contracts resides; and the principal purpose of this act, manifestly, was to distribute the benefits of the taxation to the various towns in which the lands are situated and the debtors reside. The act applies solely to taxation in towns, and the whole proceeding providing for the collection of the tax is applicable only to taxation in towns, and could not be applied to taxation in villages. Hence, as to taxation in villages, the general law authorizing assessments to agents, etc., remains in force.

I have, therefore, upon the merits of this case, reached a conclusion adverse to the relators, without examining or passing upon various technical objections raised and discussed by the counsel for the respondents.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

## Statement of case.

BARNABUS HAMMETT, Respondent, v. JOHN H. LINNEMAN et al., Appellants.

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Whether a delivery under an agreement for the sale of chattels is absolute or conditional, depends upon the intent of the parties; to establish that the delivery was conditional, it is not necessary that the vendor should declare the conditions, in express terms, at the time of delivery. It is sufficient if the intent of the parties can be inferred from their acts, or the circumstances of the case.

Although delivery, without requiring payment, is presumptive evidence of the waiver of a condition that payment should be made upon delivery to vest title in the vendee, yet this presumption may be rebutted by the acts or declarations of the parties showing a contrary intent, and the intent, where any doubt arises, is a question of fact.

Plaintiff sold to defendant L. a quantity of coal for cash on delivery; L. asked for a credit, which was refused: plaintiff knowing that L. was about failing. The coal was delivered, and carted to L.'s yard, and mixed with other coal. Three days after delivery, plaintiff again called for payment, not obtaining it, he called again in two or three days; L. stated he could not pay. The agent learning that L. had sold out, asked him what he had done with plaintiff's coal. He admitted he had sold it, adding he could not help it. Declarations of defendants were testified to, tending to prove that L. had given to defendant B. a bill of sale of the coal, before delivery. When the sheriff seized the coal, under process in this action, L. said: "It looks so much like a swindle, I am ashamed of it." *Held* (EARL and GRAY, CC., dissenting), that there was sufficient evidence to justify the finding that the payment of the price was a condition precedent to the vesting of the title in L., and that such condition had not been waived.

(Argued October 4, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, modifying a judgment in favor of plaintiff entered upon the decision of the court upon trial at Special Term.

The action is to recover the possession of 194 tons of coal, alleged to be the property of the plaintiff, wrongfully detained by the defendants, and of the value of \$597.05. The defendants deny the allegations of the complaint, and claim that the coal was purchased by Linneman of the plaintiff on

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Statement of case.

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a credit, and afterward sold for value to the defendant Broking.

The evidence for the plaintiff tended to prove a sale to Linneman, for cash on delivery, he paying the freight to the master, and taking the coal from the boat; that he had taken the coal to his yard, and in a few days sold the yard to Broking; that the plaintiff's coal had been mixed with other coal at the yard, and could not be separated; that Broking, when the coal was demanded of him, gave answers indicating that he had taken the yard for money owing to him by Linneman. The plaintiff also proved that he had offered to repay the freight and all expenses on the coal, and demanded its return, after a demand of payment of the price, and neglect to comply. The evidence of the defendants tended to prove that the sale was on credit, except the freight, which he had paid; that the sale to Broking was for a present consideration paid. On cross-examination it appeared that he knew Linneman was embarrassed, and was pressed by a suit, in which a judgment was about to be obtained, and that he knew of the sale of the plaintiff's coal, and that it had been taken to the coal yard of Linneman.

The judge found, 1st. That the sale of the coal was for cash and not on credit, and that the payment of the price was a condition precedent to the vesting of the property in the purchaser. 2d. That the plaintiff at no time waived the performance of the condition, and the price not having been paid, the title of the coal did not vest in Linneman. 3d. That the defendant Broking was not a *bona fide* purchaser of the coal from Linneman, and that as against the plaintiff the property in the coal did not pass by the transfer to Broking. 4th. That the plaintiff is entitled to recover, and the judge assessed the value of the coal at \$597.05, and the damages for its detention at \$74.88, and directed judgment accordingly.

The defendants excepted to each of the facts found by the judge and to his conclusion of law. Judgment was entered for the plaintiff for \$671.93, the amount of the value of the coal

## Statement of case.

found by the judge, and the damages for its detention, together with the costs. The defendants appealed to the General Term, where it was ordered that the judgment be set aside, and a new trial be had, unless the respondent served a notice deducting \$300 from the judgment, and that upon the serving such notice the sum of \$300 should be deducted from the judgment, and in all other respects be affirmed, without costs of the appeal to either party. Notice in conformity with this condition imposed by the General Term was served on behalf the plaintiff. The defendants thereupon appealed to the Court of Appeals.

*A. R. Dyett* for the appellants. Every absolute delivery of goods sold on condition is presumptive evidence of the waiver of the condition by the vendor. (*Smith v. Lynes*, 1 Seld., 45; *Smith v. Dennis*, 6 Pick., 266.) A condition attached to such a sale as the one at bar is invalid, being inconsistent with it. (*Ludden v. Hazen*, 31 Barb., 650, General Term, opinion by ALLEN, J.) The condition was clearly waived. (6 Cow., 110; 6 Wend., 77; 1 E. D. Smith, 196; 1 Bosw., 106; 31 Barb., 650; *Draper v. Stovenal*, 7 Transcript Appeals, 9.)

*R. M. Harrington* for the respondent. Delivery of the goods not necessarily a waiver of the condition. (Supreme Ct., 1857, *Fleeman v. McKean*, 25 Barb., 474.) Upon sale of goods for cash on delivery, title does not pass on delivery unless the condition is waived. (Ct. of Appeals, 1851, *Smith v. Lynes*, 5 N. Y., 41; Supreme Ct., 1842, *Strong v. Taylor*, 2 Hill, 326; *Fleeman v. McKean*, 25 Barb., 474.) Sending the goods in expectation of payment did not constitute an absolute delivery. (Supreme Ct., 1845, *Leaven v. Smith*, 1 Den., 571.) If the purchaser made the purchase with a knowledge of his own insolvency, though he made no false representations, the sale is void. (2 Kent Com., 484; 1 Barnd. Cr., 514; Supreme Ct., 1854, *Buckley v. Archer*, 21 Barb., 585; Supreme Ct., 1841, *Ash v. Putnam*, 1 Hill, 302; S. P., 1840, *Archer v. Campbell*, 23 Wend., 372.) A levy

## Opinion of the Commission, per LEONARD, C.

on the goods in the hands of such a purchaser is inoperative against the vendor. (Chan. P., 1829, *Durrel v. Haley*, 1 Paige, 492.)

LEONARD, C. The facts proven show that the coal was delivered to the defendant Linneman from the boat which brought it to the port of New York, and that he was allowed to cart it to his yard. Whether this was an absolute or conditional delivery depended on the intention of the parties. (*Furniss v. Hone*, 8 Wend., 256; *Smith v. Lynes*, 1 Selden, 43.)

It was a fact to be found, in this case, by the court, and it has been found adversely to the appellants. We cannot go behind the fact, as found by the judge, where there is evidence to support it. There was evidence bearing on this fact, given by both sides, and it is not our province to look into it to ascertain or give any judgment as to its preponderance. The evidence was conflicting upon all the facts found, and we cannot say that they are not well found.

It is not necessary that the vendor shall declare the condition in express terms at the time of the sale. It is sufficient if the intent of the parties can be inferred from their acts or the circumstances of the case.

On the facts, as found by Judge ALLEN, before whom the case was tried at the circuit, there is a clear case for the plaintiff.

The judge found that payment was a condition precedent to the vesting of the property in the purchaser; that the condition was never waived, and that the price was never paid. Also, that Broking was not a *bona fide* purchaser.

The counsel for the appellants insists that the judge has found against the presumption of a waiver of the condition, arising from an actual delivery of the coal without payment, without any evidence.

The case of *Smith v. Lynes* (1 Seld., 43) is decisive that delivery, without requiring payment at the time, is presumptive evidence that the condition had been waived.



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Opinion of the Commission, per LEONARD, C.

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This presumption may be rebutted by the acts or declarations of the parties connected with the circumstances, showing an intention that the delivery should not be complete until the condition should be performed. Also, that the intention, where any doubt arises, is a question of fact.

The judge has found the fact, distinctly and positively, that the condition was never waived. If this fact, so found, is supported by any evidence, the plaintiff's case must be held to have been established.

Mr. Willis, a witness for the plaintiff, testified that the coal lay at the foot of Twenty-third street, East river, and was sold for cash. That Linneman wanted him to take a thirty-day note; the said Willis being the agent of the plaintiff for selling the coal, the proposition for this credit was declined.

The coal was delivered to Linneman on Monday, Tuesday or Wednesday, and Willis called for payment on Saturday, when he paid him a small balance of twenty dollars, which Willis had advanced to the captain of the boat for freight. The balance of the freight, nearly \$200, was paid by Linneman to the captain. In two or three days, Willis called on Linneman again and asked for the money. Linneman said he could not pay it, he had had so much to pay. Willis then asked him, "did you sell out?" Linneman asked who told him, and upon the question being repeated, he said: "Yes, I was compelled to sell out." Willis then asked him what he did with Mr. Hammett's coal, and expressed the hope that he did not sell that? Linneman said he could not help it.

No claim was made by Linneman that the condition had been waived, but he excuses himself for having sold the coal without paying for it, upon the ground that he could not help it. It was an admission that the statement of Willis was correct, and that he had sold the coal when he ought not to. Willis further testified, on cross-examination, that he had sold Linneman, on previous occasions, on credit, but did

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Opinion of the Commission, per LEONARD, C.

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not at this time for the reason that he had heard that Linneman was on the eve of failing.

Willis also testified to conversations with Linneman and Broking tending to prove that Linneman had sold the coal to Broking by a written bill of sale before the coal had been received at his yard.

This evidence was disputed by Linneman, but it appears to have been credited by the learned judge before whom the action was tried without a jury. It fully proves that no claim was made by Linneman that the condition of payment, in order to complete the sale of the coal, had ever been waived at the time when the demand was made by Mr. Willis.

When the sheriff seized the coal under the proceedings for claim and delivery in this action, Linneman said: "It looks much like a swindle, and I am ashamed of it." Then to prevent the coal from being taken, he told the officer that it was mixed with the other coal in the yard, "all through."

We must assume that the judge gave credence to this evidence. The conclusion from it was plain that Linneman had endeavored to convert the coal without performing the condition upon which it was sold, so that the seller would be unable to seize it upon that ground, and, hence, that there had been no waiver. It was not necessary to stand by the coal while being delivered to the defendant's carts, and demand payment for each load before it was carted away, under the penalty of waiving the condition upon which the title was to pass. It was sufficient that payment was the condition agreed on, and that a request, in the case of a bulky article like coal, was made for payment promptly within two or three days after it had been received. Had there been any intention to waive the condition, Linneman would have claimed it when he was so severely accused of misconduct and bad faith in disposing of the coal without making any payment for it. Instead of claiming that he was not to pay on delivery, he substantially admits that such were the terms of the sale, by declaring that the transaction "looked much like a swindle, and that he was ashamed of it."

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Opinion of the Commission, per LEONARD, C.

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This testimony being credited by the court, we can be at no loss to perceive the basis of the fact found, "that the condition was never waived." It may be added that the judge might well have found that the vendee purchased the coal with the fraudulent intention of not paying for it; but he has seen fit to place his judgment upon the ground of a conditional sale, and to rebut the presumption of a waiver arising from the delivery of the coal, by a negative as to the waiver.

I think the court below might properly have found that the condition was never waived, on the evidence tending to prove that the coal was purchased with the fraudulent intention of not paying for it. A waiver of the condition could not be predicated on evidence of a fraudulent purchase, nor in a case where the vendee had sold the goods to prevent the vendor from effecting a rescission of the sale to him, on the ground of a breach of the condition. Fraud vitiates every transaction, so far as the rights of the vendee are concerned.

It is unnecessary to refer to the evidence on the part of the defendants. The question of the weight or balance of evidence passed out of the case, when it left the court below. It is not the province of this court to balance conflicting evidence. It is sufficient that evidence is to be found in the case to sustain the facts as found by the court or referee, or to sustain the verdict where the trial has been had before a jury. Questions of law only are here considered as the general rule, and this is not a case within any exception to the rule.

The defendants also urge that they have not been credited for the freight paid by them, and that this is error.

No exception on that ground appears in the case.

The defendants also conceive that it makes a technical difference in their favor that the vendor of this coal knew that Linneman kept a retail coal yard, and assumes that it was delivered for the purpose of being retailed.

No such fact can be found in the case, unless it be gleaned from the details of the evidence. The attention of the judge who tried the action does not appear to have been called to this subject, nor to the question of freight. These points

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Dissenting opinion, per EARL, C.

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cannot be legitimately raised in the cause for the first time in this court.

It is said by the defendants that the amount of the recovery is excessive.

The defendant, Linneman, mixed the plaintiff's coal with his own before payment. How much remained on hand at the time of the commencement of the action cannot be ascertained, except proximately by an estimate. The court below had the facts under review and abated \$300. We cannot explore the details of the evidence to ascertain the facts bearing on this subject. The defendants must accept the loss as the penalty for not preserving a distinction between the coal of the plaintiff and of Linneman.

It is also said that the form of the judgment as entered is erroneous. I think the form is incorrect, but the defendants can have that corrected on motion by the court below, if they feel aggrieved. It is an irregularity and not an error, to be corrected by an appeal. It does not appear that the court below have ever heard the suggestion of such a ground of complaint as the last.

The judgment should be affirmed, with costs.

EARL, C. (dissenting). The plaintiff commenced this action to recover the possession of a quantity of coal, and he claims to recover upon the ground that the sale to the defendant Linneman, was for cash, and that as he did not pay for the coal the title did not pass.

I will call attention to a few recognized principles of law, which must control the decision of this case.

When goods are sold on condition of being paid for on delivery in cash, an absolute and unconditional delivery of the goods by the vendor, without exacting at the time of delivery a performance of the condition, is a waiver of the condition, and a complete title passes to the purchaser, if there be no fraudulent contrivance on his part to obtain possession.

The vendor, to avoid a waiver of the condition of sale, must

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Dissenting opinion, per EARL, C.

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either refuse to deliver the goods without payment, or he must make the delivery at the time qualified and conditioned.

Whether the delivery be absolute or conditional must depend upon the intent of the parties at the time the goods are delivered, and this intent may be shown by the express declarations of the parties at the time of the delivery; or it may be inferred from the acts of the parties and the circumstances of the case. Where, however, the delivery is absolute, without any contemporaneous declaration qualifying it, the *onus* of the proof of the condition rests upon the vendor, and, if no such proof be offered, the delivery will be deemed absolute, and the title to the goods will pass to the purchaser. Every absolute delivery of goods, sold on condition of payment, is presumptive evidence of a waiver of the condition by the vendor, and of an intention on his part to rely wholly on the personal security of the purchaser for the payment of the price of the goods. (*Smith v. Lynes*, 1 Seld., 41; *Furniss v. Hone*, 8 Wend., 256.)

This coal was sold to one known to be a retail dealer in coal. There was an unqualified, absolute delivery of the coal to the purchaser. There can be no pretence that any express condition was attached to its delivery. Nothing whatever was said at the time of the delivery, qualifying it; and there are no circumstances surrounding the delivery, from which it can properly be inferred that it was conditional. The purchaser sold forty or fifty tons at the dock, from the barge, and immediately after delivery of the coal, commenced to retail it from his yard. Four or five days after the delivery, plaintiff's agent called upon the purchaser for pay and he said he could not pay for the coal; and the agent then asked him to pay twenty dollars on account of freight, and this he paid. The agent then went away without saying more, intending to call again at the end of another week; but in the course of three or four days, and before the end of the week, having casually heard that the purchaser had failed, he called upon him and demanded the coal, and soon after commenced this action.

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Statement of case.

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While, therefore, this was a sale for cash, there was an unconditional delivery of the coal, and the condition of payment was, within the principles of law above cited, waived. And this conclusion is reached upon the undisputed evidence, and hence we are not concluded by the finding of the learned judge at Special Term.

The judgment should be reversed and new trial granted; costs to abide event.

For affirmance, LOTT, Ch. C., LEONARD and HUNT, CC. For reversal, EARL and GRAY, CC.

Judgment affirmed, with costs.

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DANIEL LANNING, Respondent, v. BENJAMIN CARPENTER et al.,  
Appellants.

A judgment creditor has a mere general, not a specific lien upon the debtor's real estate; he cannot therefore maintain an action for waste committed thereon.

Where there is a mistake, whether of law or of fact, in reducing an agreement to form or in carrying it into effect, equity will grant relief; but where the parties adopt the security which is to be used to effectuate their intention, if the security should fail, from ignorance of the law, or from any other cause, to operate as the parties intended, the courts cannot substitute any other security for the one adopted.

Parties cannot, by agreement, convert a judgment into a personal mortgage or a bill of sale, or give to it any greater effect than the law gives to it. A parol agreement, therefore, that a judgment shall be a lien upon all the debtor's personal property, will not be enforced in equity, even as against subsequent assignees who assented to the arrangement. (EARL, C.)

It was agreed between a debtor and his creditors that he should give the latter security for their respective claims by confessing judgment, the judgment in favor of one creditor to be first entered and to have priority of lien upon all the property, real and personal, of the debtor. The judgments were entered in Schuyler county, as agreed, all parties supposing that county to be legally organized. It was subsequently decided that Schuyler county was not constitutionally organized, and that the judgment should have been docketed in Steuben. In an action brought by the preferred creditor to establish his equitable lien,—*Held*,

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Statement of case.

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that, as between the parties, the plaintiff was entitled to the same position that he would have occupied had his judgment been docketed in the proper county; but he was not entitled to a lien upon timber cut upon the debtor's real estate after the docketing of the judgment, and transferred by the latter to the other creditors to be applied upon their judgments before the issuing of execution upon plaintiff's judgment. Also *held* (EARL, C.), that plaintiff had no lien upon the debtor's personal property which had been so transferred prior to the issuing of his execution.

(Argued May 19, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the seventh judicial district, affirming a judgment in favor of plaintiff entered upon the decision of the court at Special Term.

This action was brought to establish and enforce an equitable lien upon the property of John Carpenter. On the 14th of July, 1865, John Carpenter was indebted to certain banks in \$5,000, secured by the indorsements of defendants, Benjamin Carpenter, Benson Smith, Rice Tompkins and D. J. Sunderlin. He was indebted to plaintiff \$450, and was also indebted upon two notes indorsed by Sunderlin \$1,000. It was agreed between all the parties that plaintiff should assume and pay the \$1,000, and that Carpenter should confess judgment to him for the \$1,450, which judgment should be first entered and docketed, and should have the first lien upon all of Carpenter's property, real and personal; that said Carpenter should confess judgment or judgments to defendants, Benjamin Carpenter, Smith and Tompkins for \$3,500 to secure them against their indorsements, which said agreement was carried into effect. Plaintiff's judgment was perfected and docketed in Schuyler county clerk's office, July 14, 1865; said defendants' judgment was docketed July 15. On the 18th July, Carpenter executed a bill of sale of a large amount of his personal property to Carpenter, in consideration of \$3,500 to be paid by the latter upon the notes, and secure the indorsers upon which the second judgment was given. On the day or two prior to the 4th October, 1855, John Carpenter caused 300 trees to be cut down upon his land, and

## Statement of case.

upon the 15th turned them out to B. Carpenter, Smith and Tompkins, to indemnify them for their indorsements. On the 14th October plaintiff issued execution upon his judgment, and levied upon the personal property, including the trees so cut down. The property was advertised for sale when a motion was made to set aside and vacate plaintiff's judgment and execution, and proceedings stayed. The order staying was modified so as to allow the sheriff to sell the property and hold the proceeds to abide the event. At the sale defendants Smith and Tompkins purchased for \$903, giving their note to the sheriff. Smith had sold \$116 of the property levied on prior to the sheriff's sale. The judgment and execution were vacated and set aside by the General Term upon the sole ground that the act of the legislature, 1854, erecting the county of Schuyler, was unconstitutional; some other facts appear in the opinion. The court decided that under the agreement of July 14 the plaintiff obtained an equitable lien upon the property of J. Carpenter, and was entitled to a preference over any subsequent liens acquired by defendants B. Carpenter, Smith and Tompkins, by judgment or otherwise, upon the property levied upon. That the written confession of judgment to plaintiff was in equity entitled to the same force and effect as if entered and docketed in the proper county and execution then issued. That plaintiff was entitled to the proceeds of the sale and judgment was directed against Smith and Tompkins for the amount of their note and interest, \$1,347.21; and against Smith for \$116 and interest making \$173.60 with costs and disbursements. Judgment was accordingly entered. Defendants B. Carpenter and Tompkins appealed.

*Francis Kernan and John D. Kernan* for the appellants. If material findings of fact are without evidence to support them, and are duly excepted to, the finding is erroneous as matter of law, and will be reviewed. (*Mason v. Lord et al.*, 40 N. Y., 476; *Putnam v. Hubbell*, 42 id., 106.) Plaintiff's judgment and execution was void. (20 N. Y., 447.) He



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Opinion of the Commission, per EARL, C.

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was, then, but a general creditor, and could not attack the bill of sale as fraudulent. (*Hastings v. Belknap*, 1 Den., 190; *Andrews v. Durant*, 18 N. Y., 500; 32 id., 457; 24 id., 825; 3 Kern., 488; 1 Ed. Ch., 654.) The refusal of a court to find a fact, established by uncontroverted evidence, is error of law. (*Grant v. Morse*, 22 N. Y., 323; 40 id., 476.) Equity will not remodel agreements and securities which fail through mistake of law. (Willard's Eq., 47, *et seq.*; Story's Eq., §§ 64, 69.) Plaintiff elected to pursue his remedy at law; he cannot now resort to equity to obtain the same relief. (23 Barb., 410; 20 N. Y., 447; *Simpson v. Hart*, 1 J. Ch., 91; *Sauger v. Wood*, 3 J. Ch., 416.) The matter is *res adjudicata*. (23 Barb., 410; 20 N. Y., 447.) Parties cannot, by contracts, give more extensive effect to judgments than that the law gives. (*Knerth v. Newcomb*, 22 N. Y., 249, 253.) Defendant's rights attached before the judgment could, by law, become a lien upon personal property. (*Ray v. Birdage*, 3 Den., 619; *Roth v. Wells*, 29 N. Y., 472.)

*David B. Prosser* for the respondent. The court must be requested to find upon a question of fact before a party can avail himself of the omission or neglect. (*Phelps v. McDonald*, 26 N. Y., 82.) Defendant having, in good faith, parted with his money upon the agreement, ought not in equity to be deprived of the benefits of it. (*Hawley v. Becker*, 40 N. Y., 169; *Craig v. Leslie*, 3 Cranch., 569, 579; *Crabtree v. Bramble*, 3 Atk., 687; *Bank of R. v. Jones*, 4 N. Y., 497; *White v. Carpenter*, 2 Paige, 217; *Parkhurst v. Alexander*, 1 J. Ch., 398; 2 McCord, 126; *Jackson v. Craft*, 18 J., 110; *Delair v. Keenan*, 3 Desauss., 74; *Reid v. Simmons*, 2 id., 552; *Matter of Hurd*, 11 Paige, 154; Willard's Eq., 441; Miller's Eq. Mort., 95, margin 100.)

EARL, C. It was agreed that the plaintiff should have a valid judgment against John Carpenter, which should be a lien upon his property, and this lien he could get only by docketing the judgment in the proper county. Both parties

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Opinion of the Commission, per EARL, C.

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supposing Schuyler county to be legally organized and constituted as such, directed it to be docketed in the clerk's office of that county, and it was thus docketed. It was subsequently ascertained that Schuyler county was not constitutionally organized, and hence that the judgment should have been docketed in the clerk's office of Steuben county. I cannot doubt that the plaintiff is entitled to the same position in this case that he would have occupied if his judgment had been docketed in the latter clerk's office, the proper place. It was agreed that he should have a lien by judgment, properly confessed and docketed; and by mistake, as I think, of law, it was docketed in the wrong place. There was no mistake of law or of fact in making the agreement, but simply a mistake in reducing the agreement to form, or in carrying it into effect. For such a mistake, whether it be of law or of fact, I do not understand equity to refuse relief. But treating the plaintiff as having a judgment properly docketed, July 14th, 1855, I am still unable to see how, upon the facts appearing in this case, this judgment can be sustained. The plaintiff could not claim his equitable lien in this case, if he were a mere general creditor, without any judgment or agreement. He must rely, then, upon his judgment, or upon some agreement, or upon both.

Can he rely upon his judgment alone? In such case he would have no lien upon merely personal property until he should issue execution, and I know of no case which holds that he could sue and recover for waste committed upon the real estate. A judgment creditor has a mere general lien, not a specific one, upon real estate, and hence differs from a mortgagee, who can sue for waste which injures his security. But if the plaintiff, as a judgment creditor, could sue for the waste committed upon the real estate of the judgment debtor, he could recover only by showing that such waste damaged or endangered his judgment security. Here there was no allegation, proof or finding to sustain such a recovery. The plaintiff gains no aid from the fact that he issued execution upon his judgment, because, treating the execution as valid,

most of the property levied on, if not all, was transferred by John Carpenter before the execution was issued; and there is no claim or pretence that this transfer was in fact fraudulent, except as it was a violation of the agreement made upon the 14th day of July, 1855; and the relief to the plaintiff granted by the court below was not based upon the fact that the plaintiff had got any lien by his execution before the transfer, but it was based entirely upon the agreement made July 14th. Hence it is entirely clear that if the plaintiff is obliged to rest his case upon his judgment and execution alone, treating them both as valid, he must fail.

How is the plaintiff aided by the alleged agreement that by the judgment he was to have a first lien upon all John Carpenter's real and personal property? The only agreement alleged, and the only one found, is that the plaintiff was to have his lien through the judgment. The parties adopted the very security which was to be used to effectuate their intention, and even if that security should fail, from ignorance of the law or any other cause, to operate as the parties intended, the courts cannot substitute any other security for the one they adopted; and the plaintiff must take what that security can legally give him and no more. (*Hunt v. Rousemaniers' Administrators*, 1 Peters, 13.) It seems to me quite clear that the parties could not by agreement give a judgment any greater effect than the law gives it. They could not convert it into a personal mortgage or bill of sale. Notwithstanding the agreement, it remained a judgment, and nothing more than a judgment.

But aside from the judgment, if John Carpenter had, on the 14th day of July, agreed with the plaintiff that he should have a general lien upon all his personal property, what effect could it have had? The personal property was not delivered; there was no writing, and nothing was paid. How could equity enforce such an agreement? It could not operate as a pledge, as there was no delivery. It could not operate as a parol mortgage, which would have been a conditional sale, as there was no compliance with the statute of frauds. It would

be quite an anomaly for equity to uphold and enforce such a lien, based upon no writing, upon undefined personal property.

But there is still further difficulty as to this alleged lien upon the personal property. Most of it was not in existence at the time of the alleged agreement. The amount of personal property sold by the sheriff was \$1,144, after deducting sheriff's fees. Of this sum, as alleged in the complaint, and as proved by uncontradicted evidence, \$856.75 was realized by the sale of lumber and logs, cut upon the Kernan lot, after July 14. The lumber and logs were part of the real estate, at that time, and hence were unaffected by the agreement that the plaintiff should have a lien upon John Carpenter's personal property. As to them, if the plaintiff has any remedy at all, it is by assuming that the judgment was a valid lien upon the real estate, and that it was waste to cut down the trees; and that such waste damaged or endangered his judgment security. But for reasons above stated, a recovery cannot be upheld upon this theory.

Again, it was found at Special Term that at the time plaintiff's judgment was confessed, and the alleged agreement was made, it was agreed that the trees might be cut down and manufactured into lumber, and the share thereof belonging to John Carpenter might be applied upon the judgment confessed to defendants Smith, Tompkins and Benjamin Carpenter. All of the lumber and trees, above mentioned, which were sold by the sheriff for \$856.75, were cut and manufactured after the said agreement, and the three defendants were endeavoring to apply the proceeds of the lumber upon the judgment held by them, and the trees and lumber had been actually transferred to them by John Carpenter for that purpose. How could such transfer be a fraud upon the plaintiff; and how could he have an equitable lien thereon, superior to the legal and equitable claim of the transferees thereof?

Still further, while John Carpenter and others were cutting down the trees upon the Kernan lot, Kernan appeared there and claimed that they were endangering the security of a mortgage which he held for about the value of the real estate,

## Statement of case.

and he forbade their cutting or removing the trees until they paid him two payments upon his mortgage, so as to make his mortgage security good; and unless they would do this, he threatened to enjoin them against cutting or removing the logs. Upon the facts as they appear in this case, he could probably have procured such an injunction. Then the three defendants paid to him, by their notes, the sum of about \$450 upon his mortgage, and received his assent to remove the logs. After this, the sheriff seized and sold the logs, and, as I understand the evidence, realized more than \$500 for them. This sum was included in the amount which the plaintiff was allowed to recover, without any allowance whatever for the sum thus paid by the three defendants. This was manifest error. The sum which the defendants paid Kernan to release his claim upon the logs should have been allowed to them in some form, or adjusted in some way in this action.

For all the reasons above mentioned, I favor a reversal of the judgment below, and a new trial, costs to abide event.

LOTT, Ch. C., and LEONARD, C., concur with EARL, C., that the plaintiff ought not to have recovered the sum of \$856.75 mentioned in the above opinion, upon both grounds stated in the opinion. And they express no opinion as to whether the plaintiff could recover for the balance of the personal property.

HUNT and GRAY, CC., not voting.

Judgment reversed.

EDWIN PITCHER, Respondent, v. MICHAEL HENNESSEY,  
Appellant.

48	415
110	59
48	415
138	21

Defendant agreed to run plaintiff's boat from Oswego to Martinsburgh; "risk of navigation assumed" by plaintiff. Defendant was prevented from performing by the fact that the boat was too large to pass through the locks on the Black River canal. *Held*, that the term "risks of navigation," as used in this agreement, had a broader signification than "perils of navigation," and that plaintiff assumed all the risks attendant upon the navigation through the canal which were beyond the control of defendant, including the risk in question.

48	415
167	365

## Statement of case.

Defendant alleged, in his answer, that by the verbal agreement between the parties, in pursuance of which the written contract was intended to be drawn, it was understood that the risk, as to the practicability of the boat passing through the locks, was to be, and it was understood by them was, assumed by the plaintiff, and asked to have the written contract reformed to correspond with the agreement, should such correction become necessary. The court below decided that the words in the contract did not include this risk. *Held*, that, with this construction, the answer sufficiently showed a mutual mistake, and that defendant was entitled under it to introduce evidence as to the original agreement.

Where parties, to carry out their contract, agree to use an instrument which, by their mistake of the law, will not effectuate their intention, equity will not reform the instrument or substitute another; but where parties intending to reduce a parol agreement to writing, and because they are ignorant of the force of language, and misunderstand the meaning of the terms used, make a contract different from that designed, equity will grant relief by reforming the instrument and compelling the parties to execute and perform their agreement as they made it. It matters not whether such a mistake be called one of law or of fact. An equitable defence of this nature can be litigated upon a jury trial.

(Argued May 20, 1871; decided January term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial district, affirming judgment in favor of plaintiff entered upon a verdict. Action to recover damages for alleged breach of contract. The facts sufficiently appear in the opinion.

*J. R. Swan, Jr.*, for the appellant. Defendant's agreement "to run" the boat did not make him liable as common carrier. (2 C. & H. Notes, 1387; Story on Bailments, §§ 457, 495; 3 Wend., 158; 2 Cow., 204.) As employee he was only liable for misconduct or neglect. (Story on Agency, §§ 85, 118, 193 to 197, 208, 217, 237.) He could limit his liability by any agreement they saw fit to make. (2 Com., 204, 209.) Evidence of the conversations, prior to the written agreement, was improperly excluded. (*Blossom v. Griffin*, 3 Ker., 569; *Renard v. Sampson*, 12 N. Y., 561; *McCulloch v. Gerard*, 4 Wash., 289; *Morvald v. Lord Londesborough*, 2 Ellis & B., 307; 1 Greenleaf Ev., § 262; *Dodge v. Gardiner*, 31 N. Y., 239; *Spencer v. Babcock*, 22 Barb., 326; *Almgren v.*

## Statement of case.

*Dutilth*, 5 N. Y., 28; *Birch v. Depuyster*, 2 Eng. C. L., 210; *Hinneman v. Rosenback*, 39 N. Y., 118; *Thomas v. Tenscott*, 53 Barb., 200; *Hutchins v. Hibbard*, 34 N. Y., 24; *Waterman v. Johnson*, 13 Pick., 261; *Walrath v. Thompson*, 4 Hill, 200; 18 N. Y., 502, 508, 509.) Defendant's answer presented a case entitling him to equitable relief. (Willard's Eq., 73; 3 Ker., 542; 16 How., 32; *Dobson v. Pierce*, 12 N. Y., 156; *Bartlett v. Judd*, 21 id., 200; 14 id., 85; 12 id., 247; 15 id., 374, 378; 25 id., 625.)

*Waterman & Hunt* for the respondent. The contract imposed upon defendant the duty of taking the boat to Martinsburgh. He is bound to make it good, notwithstanding an unavoidable delay. (Allyn, 26; *Shuebrick v. Salmon*, 3 Brenow, 1637; *Bullock v. Dommitt*, 6 T. R., 650; *Brecknock Co. v. Pritchard*, 6 id., 650; *Hadley v. Clark*, 8 id., 259; *Hand v. Boynes*, 4 Whart., 204; Angell on Car., § 294; Chitty on Con., 737; 2 Par. on Con., 1184; *Beebe v. Johnson*, 19 Wend., 500; *Tompkins v. Dudley*, 25 N. Y., 252; *Harmony v. Bingham*, 2 Ker., 99, 107, 115; *Baker v. Johnson*, 2 Rob., 570.) The difficulty encountered was not a "risk of navigation." (1 Greenleaf Ev., § 278; *Hand v. Boyne*, 4 Whar., 204; *Atwood v. R. Trans. Co.*, 9 Watts, 87; 5 Yerger, 72; Angell on Car., § 168; *Williams v. Bronson*, 1 Murphy, 417; *Johnson v. Friar*, 4 Yerger, 48; 3 Kent, 300; 1 Phil. on Ins., 635; 2 Sumner, 567; 5 Watts, 87; Abb. on Ship., 5 Am. ed., 470; 2 Sumner, 202; *Redpath v. Vaughn*, 52 Bar., 496; 2 Arnold on Ins., 796; *Crosby v. Fitch*, 12 Conn., 419.) The offer to show a prior parol contract was inadmissible. (2 C. and H. Notes, 1466, note 984; *Filkins v. Wyland*, 24 N. Y., 338; *Van Ostrand v. Reed*, 1 Wend., 424; *Mumford v. McPherson*, 1 J., 414; *Niles v. Culver*, 8 Barb., 205; *Renard v. Sampson*, 12 N. Y., 561; *Hovey v. A. M. Ins. Co.*, 2 Duer, 554; *Fitzhugh v. Wyman*, 5 Seld., 559; *Curtiss v. Howell*, 39 N. Y., 210; *Simmons v. Laro*, 8 Bos., 213.) The contract could only be reformed in equity. (*Gillespie v. Morn*, 2 J. Ch., 585.) A contract can only be reformed for

## Opinion of the Commission, per EARL, C.

fraud or mistake. (*Burton v. Sackett*, 3 How., 358; *Jarvis v. Palmer*, 11 Paige, 650; *Coles v. Browne*, 10 id, 525; *Wemple v. Stewart*, 22 Barb., 154; *Lamoreaux v. A. M. Ins. Co.*, 3 Duer, 680.) The answer contained no sufficient allegation of mistake or surprise. (*Wemple v. Stewart*, 22 Barb., 164; 1 Story Eq., §§ 152, 155, 156, 157; 2 J. Ch., 1596; 10 Paige, 525; 1 Hop., 124; 29 Barb., 595; 17 J., 373; 11 Paige, 658.) Without these allegations it was insufficient. (1 Hop., 124; 3 How., 358; 22 Barb., 154; 11 Paige, 658.)

EARL, C. The plaintiff purchased 3,000 bushels of wheat in Oswego, and he could get no one, neither the defendant nor any one else, to freight it for him. For the purpose, therefore, of securing the transportation of his wheat, he made an agreement with the defendant to purchase his boat for the sum of \$1,800, and the defendant agreed to load the wheat on the boat and run the boat and transport the wheat to Martinsburgh. The sale of the boat and the contract to load and run her were all one entire agreement, the consideration of which, on the part of the plaintiff, was the \$1,800 to be paid by him.

The plaintiff, evidently, would not have bought the boat unless the defendant had agreed to run her and carry the wheat; and the defendant would not have agreed to carry the wheat unless the plaintiff had bought the boat. This agreement was reduced to writing in two separate instruments, drawn and executed at the same time and place, one of which was a mere bill of sale signed by the defendant, transferring the boat and her appurtenances, and the other was signed by both parties and was as follows:

"Michael Hennessey is to run boat T. Matthews, this day sold to Edwin Pitcher, of Martinsburgh, Lewis county, to the warehouse of said Pitcher on the Black river, in Martinsburgh loaded, at his, said Hennessey's, expense, except the tolls and insurance, which said Pitcher is to pay. Said boat



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Opinion of the Commission, per EARL, C.

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to run there with ordinary dispatch and to start immediately.  
Risk of navigation assumed by said Pitcher.

“M. HENNESSEY.

“EDWIN PITCHER.

“Dated Oswego, *Nov. 22, 1864.*”

These two instruments are to be construed together, precisely as if they were embodied in one.

By the agreement, as thus reduced to writing, the plaintiff became the owner of the boat, and the defendant agreed to take on a cargo and run her for the plaintiff to Martinsburgh; and this he agreed to do absolutely, unless prevented by some “risk of navigation.” He was prevented because the boat was too large to pass the locks on the Black River canal with her cargo, and the first question to be determined is whether the risk of passing the locks was a “risk of navigation.” The learned judge who wrote the opinion of the General Term held that these words had a fixed legal signification, and meant the same as perils of the sea, or perils of navigation. These latter terms are held to cover losses or damage, occasioned by stress of weather, winds, waves, lightning, tempest, rocks, sands, and other extraordinary causes which no human care or foresight could guard against or prevent. (Story on Contracts, § 166; 2 Parsons on Mar. Law, 219; Angell on Car., § 168), and very likely they would not cover this peril. But there is no case holding that “risk of navigation” means the same thing as “perils of navigation,” and there is no authority that I have been able to find, defining or fixing the meaning of this term. Hence we are to construe these words in the connection in which they are used, applying the ordinary canons of construction. We are to consider the circumstances and condition of the parties, and the objects they had in view, and thus ascertain, as well as we can, what they meant by these words. Both parties were ignorant of the precise size of the locks, and both undoubtedly supposed that the boat could pass through the locks. The plaintiff owned the boat and cargo; and the defendant was to run the

boat with the cargo to Martinsburgh. The defendant was unwilling to bear the risks which were beyond his control, and were incident to navigation of the canal, and these risks the plaintiff was willing to assume. If the boat and cargo were lost without the fault of the defendant, the loss was to fall upon the plaintiff. If the defendant was prevented from reaching Martinsburgh with the boat and cargo, by the freezing of the canal, or any other unforeseen or unavoidable peril of navigation, he was to be excused. He was to be excused if the canal should give away, or a lock should break without his fault. And yet, can we hold that he assumed the risk that the canal or locks were of sufficient size for his boat? Taking the relation and situation of the parties into view, I think that it is clear that the defendant meant only to assume all the risks occasioned by the negligence and misconduct of himself and his servants; and that the plaintiff meant to assume all the risks, attending upon the navigation through the canal, which were beyond the control of the defendant.

The plain, ordinary meaning of the language used admits of this construction, and it seems to me to be in accordance with the presumed intention of the parties. Hence I am of the opinion that the court erred in holding that the defendant had, and that the plaintiff had not, by the terms of the agreement, assumed the risk in question.

But if I am wrong in this conclusion, then I think the court erred in not allowing proof for the reformation of the contract. On the trial the defendant claimed that, by the terms of the written agreement, the risk in question was assumed by the plaintiff; and that if this was not the true construction of the written agreement, then it did not express the intention of the parties, and should be reformed. After the court had held that this risk under the written contract was not assumed by the plaintiff, and rested upon the defendant, the defendant; (1) for the purpose of procuring a reformation of the contract; and (2) to explain any ambiguity there might be upon the face of said contract, and the meaning of the words "risks of navigation," as understood by the parties, offered

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Opinion of the Commission, per EARL, C.

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to prove "conversations which took place between the plaintiff and defendant before the execution of the written contract between the parties which has been given in evidence. That in such conversations the defendant desired the plaintiff to furnish men and teams at Rome to assist in getting boat and cargo to Martinsburgh, where plaintiff wanted the wheat. The defendant told the plaintiff he knew nothing of the Black River canal or the size of its locks, and inquired of Mr. Pitcher if he knew the size of the locks, and said to him that he, Hennessey, would take no risk as to the length of the locks or the freezing up of the canal, and that plaintiff said he would take those risks."

The counsel for the plaintiff objected to this evidence, on the ground "that it was incompetent and immaterial, and that all conversations, prior to said contract, were merged in the written agreement; and that there was no ambiguity upon the face of the contract which required explanation; that such testimony was incompetent and immaterial for the purpose of reforming the contract; and that defendant's answer did not present a case, or contain the allegations necessary for the reformation of said contract." The court overruled the offer and excluded the evidence, and held and decided (1) that there was no ambiguity in the language of the contract which admitted of or required explanation. (2) That all communications and verbal agreements between the parties, prior to the execution of the written contract between them in relation to the subject-matter thereof, were merged in the written contract, and could not be proved to contradict or vary the same, or give it a meaning beyond its plain and obvious tenor. (3) That the testimony was inadmissible, for the purpose of reforming the contract, on the ground that no case was presented by defendant's answer for a reformation of the contract. It does not allege the facts upon which such reformation could be made. The judge further remarked that, independent of the pleadings, the reformation of a contract was a matter of equitable jurisdiction, and could not come up

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Opinion of the Commission, per EARL, C.

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before the jury. To each of which rulings and decisions of the court the defendant excepted.

The court clearly erred in holding that the equitable defence or counterclaim, set up by the defendant, could not be tried in this action. That it could be, is too thoroughly settled to admit of further dispute. (*The New York Ice Company v. The North-western Ins. Co.*, 21 How., 296; *Dobson v. Pearce*, 12 N. Y., 156; *Phillip v. Gorham*, 17 id., 270; *Bartlett v. Judd*, 21 id., 200; *Latin v. McCarty*, 41 id., 107.)

Hence if this equitable defence was sufficiently set up in the answer, it should have been tried and determined by the court; and the next question to be considered is, whether the answer was sufficient to authorize a reformation of the contract, and I cannot doubt that it was. It avers, "that by the verbal agreement between the said plaintiff and defendant, in relation to the delivery of said boat and cargo, at Martinsburgh, aforesaid, which preceded the execution of said written contract, and in pursuance of, and in conformity with which said verbal agreement, the said written contract was, as this defendant believes and avers, by both of said parties intended to be, and understood to have been drawn, this defendant was not to assume or take any risk in respect to the size of the said canal boat, as compared with the size and capacity of the locks on the Black River canal through which the said boat would be obliged to pass on the route to Martinsburgh aforesaid, or in respect to the practicability of passing the said canal boat through said locks, but, on the contrary, such risk, it was understood by both of said parties, should be, and was understood by them to have been, assumed by the said plaintiff, in and by the terms of the said written contract for the delivery of said boat at Martinsburgh aforesaid," and prays that the written contract "be corrected and reformed by inserting therein a clause or provision that the risk of the impracticability of passing the said boat and cargo through the locks of the Black River canal be assumed by the plaintiff, should such correction become necessary to attain justice between the parties." The prayer for relief is

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Opinion of the Commission, per EARL, C.

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sufficient. It indicates with sufficient certainty the correction or reformation desired, and I am unable to see why the facts alleged as the ground for the relief prayed for are not also sufficient. They are, in substance, 1. That the parties made a parol agreement, by which the defendant was not, and the plaintiff was, to assume the risk in question. 2. That both parties intended this agreement should be embodied in the written contract. 3. That they both understood it was so embodied. 4. That the contract was so drawn that the plaintiff assumed only the risk of navigation, and this the court below held did not include this risk. It is true that the answer does not, in so many words, aver any mistake; but the facts alleged clearly show a mutual mistake, and point out with entire certainty in what the mistake consisted. No one could doubt, from the allegations contained in the answer, the ground upon which the reformation of the contract was claimed; and the court could see, from the allegations in the answer, if they were proved precisely as made, how the contract was to be reformed. What more could be needed to answer any rule of pleading? We have then a case, as made by the answer, where a mutual mistake was made in reducing the parol agreement to writing and in signing the written contract. In such a case equity will conform the written instrument to the parol agreement which it was intended to embody. Story, in his *Equity Jurisprudence*, section 115, says: "Where an instrument is drawn and executed, which professes or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or to law, does not fulfill that intention, or violates it, equity will correct the mistake, so as to produce a conformity to the instrument." And this language was taken from the learned opinion of Mr. Justice WASHINGTON, in *Hunt v. Rousmaniere's Adm'rs* (1 Peters, 13).

Parties to an agreement may be mistaken as to some material fact connected therewith, which formed the consideration thereof or inducement thereto, on the one side or the other;

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Opinion of the Commission, per EARL, C.

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or they may simply make a mistake in reducing their agreement to writing. In the former case, before the agreement can be reformed, it must be shown that the mistake is one of fact, and mutual; in the latter case it may be a mistake of the draftsman, or one party only, and it may be a mistake of law or of fact. Equity interferes, in such a case, to compel the parties to execute the agreement which they have actually made. Sometimes it happens that parties agree, as in the case above cited from Peters, to carry out their agreement by an instrument which, by their mistake of the law, will not effectuate their intention. In such a case equity will not reform the instrument, or substitute another instrument which will, in law, give effect to their intention, because they adopted and agreed upon the particular instrument, and equity will not compel them to execute an agreement which they never agreed to execute, and thus make an agreement for them. But in this case the parties intended, according to the answer, to reduce their parol agreement to writing, and to embody it in the instrument; and either because they or their draftsman did not understand the force of language, or because some language which they intended should have been inserted in the instrument was omitted by mistake, their intention was not carried into effect, and the instrument failed to embody their agreement.

It is claimed on the part of the plaintiff that if the mistake occurred because both parties misunderstood the meaning of the terms "risk of navigation," both parties believing that these terms would include the risk in question, then no reformation of the contract can be had. This claim is not well founded. When parties have made an agreement, and there is no allegation of any mistake in it, and in reducing it to writing, they, by mistake, either because they did not understand the meaning of the words used, or their legal effect, failed to embody their intention in the instrument, equity will grant relief by reforming the instrument, and compelling the parties to execute and perform their agreement as they made it; and it matters not whether such a

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Opinion of the Commission, per EARL, C.

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mistake be called one of law or of fact. (*Oliver v. The Mutual Commercial Ins. Co.*, 2 Curtis, 277.)

Hence I conclude that the learned judge at the circuit erred in excluding proof of the alleged mistake, and in holding that the equitable defence could not be litigated at the trial. I therefore favor a reversal of the judgments, and a new trial, costs to abide event.

All concur.

Judgment reversed.





CASES DECIDED  
IN THE  
COMMISSION OF APPEALS  
OF THE  
STATE OF NEW YORK,  
AT THE MAY TERM, A. D. 1872.\*

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THE LONG ISLAND FERRY COMPANY, Respondent, *v.* HENRY  
S. TERBELL, Executor, etc., Appellant.

The salary allowed to an officer of a corporation is presumed to be for services to be performed by him as such. Where, therefore, with the assent and co-operation of such officer, all the property, business and franchises of the corporation are sold, so that he has no further duty to perform, there is no basis in law or equity for a claim, upon his part, that the salary continues, and the contract, as to salary, will be deemed to be canceled, although the corporation itself is not dissolved.

(Argued January 2, 1872; decided May term, 1872.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial district, setting aside a verdict in favor of plaintiff and ordering a new trial.

This action was commenced against Gerrit Smith, defendant's testator, to recover money collected by him as president of the plaintiff. He claimed to retain the money and apply the same upon his salary as president. The only question

\*Owing to the appointment of LEONARD, C., to the bench of the Supreme Court, in the first district, and his contemplated resignation of his seat in the commission, the decisions of this term were handed down upon the first day of term (May 7th), instead of, as usual, upon the last day. (REPR.)

litigated was whether the salary claimed was due to him. At the close of the evidence the court directed a verdict for the defendant, and stayed the entry of judgment, and ordered the motion for a new trial upon exceptions to be heard in the first instance at the General Term.

The facts appear sufficiently in the opinion.

*Joshua M. Van Cott* for the appellant. The corporation was not dissolved by the transfer. (*Brinkerhoff v. Brown*, 7 J. Ch., 217; *Bradt v. Benedict*, 17 N. Y., 93.)

*Amasa J. Parker* for the respondent.

EARL, C. The Long Island Ferry Company was incorporated in May, 1859, under the general act authorizing the formation of such companies, passed in 1853, for the purpose of running ferries between New York and Brooklyn. Prior to that time, the parties interested in the corporation had been carrying on the ferry business as a joint-stock association, of which Smith was president, and such association was merged in the corporation. He was continued and acted as president of the corporation. In June, 1859, the directors of the corporation adopted resolutions making the office of president a salaried office, and fixing the salary at \$2,500 per year. Under these resolutions Smith was paid his salary to May 2, 1860, and he claimed to apply the money collected by him, and claimed by the plaintiff, upon his salary, which accrued subsequently to that time.

In February, 1860, an agreement was made between the plaintiff and the Brooklyn Ferry Company, by which the former sold to the latter all its lands, boats, fixtures and other property connected with and used in its business, and also the privilege or license to run the ferries, and agreed to take in payment therefor stock in the latter company for the stockholders of the former, the latter also agreeing to pay certain debts of the former. This agreement seems to have been negotiated by Smith on the part of the plaintiff, and

was signed by him, and was approved by the stockholders. At a meeting of the stockholders held February 21, 1860, a resolution was adopted requesting the stockholders to return to a committee the scrip of stock in the company to be canceled, and the directors appointed a committee to settle and wind up the affairs of the company.

After the sale and transfer of its property, as above mentioned, it does not appear that the plaintiff ran any ferries or did any business as a ferry company. The plaintiff offered on the trial to show that it did not in fact run any ferries or do any ferry business after that, and the court, upon the objection of the defendant, excluded the evidence and gave plaintiff an exception.

There was a meeting of the board of directors held in July, 1860, at which Smith presided, and it does not appear that he rendered any other service as president after May 2, and no other meeting of the directors was held after that.

It is quite clear that it was the intention of the directors and stockholders to merge the plaintiff into the Brooklyn Ferry Company, to which all its property and business were transferred, and to wind up and close its business as a ferry company.

Under such circumstances, was Smith entitled to any salary as president after the sale and transfer of plaintiff's property and business as above mentioned? We are of the opinion that he was not.

We must assume that the salary was provided as a compensation for services which the president was expected to perform for the company, and when, with the assent of Smith, and by his co-operation, the company disposed of all its property and ferry business, so that, so far as appears, he had no further duty to perform or service to render as president, there was no basis in law or equity for his claim that his salary should continue. The contract as to salary must be deemed dissolved by the act and consent of the parties.

It is unnecessary to consider whether all the acts above mentioned worked a dissolution of the plaintiff as a corpora-

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Statement of case.

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tion. The defendant claims that no dissolution has taken place, and the plaintiff, while in court, suing in its corporate name, cannot well claim that it has ceased to exist. Upon the dissolution of a corporation, the directors then in office become trustees to settle up its affairs, and suits must then be commenced in the names of such trustees. (1 R. S., 601, §§ 9, 10.) This suit was not brought, or defended or tried, upon such a theory.

The order of the General Term must be affirmed, and judgment absolute ordered for plaintiff, with costs.

All concur.

Judgment accordingly.

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GEORGE ASHLEY et al., Executor, etc., Respondents, v. FREEMAN DIXON, Appellant.

If A. has agreed to sell property to B., C. may, at any time before the title has passed, induce A. to sell it to him instead, and if not guilty of fraud or misrepresentation, he does not incur any liability, and this is so, although C. may have contracted to purchase the property of B. B. cannot maintain an action upon the latter contract, as he cannot perform, and can only look to A. for a breach of the former.

(Argued January 2, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial district, affirming a judgment in favor of plaintiffs entered upon a verdict.

The action is brought to recover damages to which plaintiffs claim themselves entitled from the following facts:

On the 24th of January, 1863, one Edwin L. Patrick, by agreement in writing, contracted to sell and convey to William H. McEachron, plaintiffs' testator, certain premises in Washington county, the deed to be delivered April 1st, and purchase-money paid April 3d, then next: On the 10th of February, 1863, McEachron contracted to sell and convey the premises to defendant; deed to be delivered and pur-

## Opinion of the Commission, per EARL, C.

chase-money paid April 1st. Subsequently, defendant, by offering a larger price, induced Patrick not to perform. Upon the 1st day of April, McEachron went to Patrick to tender the money and demand deed, but Patrick was absent; a tender and demand were subsequently made and refused. Defendant made a tender under his contract, and demanded a deed of McEachron April 1st. Upon the 4th of April, Patrick deeded to defendant. Plaintiffs obtained a verdict for \$566.58.

*M. Fairchild* for the appellant. Plaintiffs cannot recover without showing fraud or deception, and also damage resulting therefrom. (*Young v. Scovell*, 8 J. R., 25; *Johnson v. Hitchcock*, 15 id., 185; *Gallager and Mason v. Brunell*, 6 Cow., 347-352; *Benton v. Pratt*, 2 W., 385; *Hutchins v. Hutchins*, 7 Hill., 104; *Tappan & Co. v. Powers*, 2 Hall, 277; *Otis v. Raymond*, 3 Conn., 413.) Satisfaction by one of two wrong-doers extinguishes the claim. (*Livingston v. Bishop*, 1 J. R., 290; *Knickerbocker v. Colver and Haves*, 8 Cow., 111; *Bird v. Randall*, 3 Burrows, 1345.)

*James Gibson* for the respondents. Defendant is estopped from setting up a non-performance caused by his own fraud or misconduct. (*Moses v. Beirling*, 31 N. Y., 462; *Carman v. Pultz*, 21 id., 549; *Holmes v. Holmes*, 5 Seld., 527; *Young v. Hunter*, 2 id., 204, 207.)

EARL, C. If this be treated as an action to recover the purchase price of the real estate which McEachron contracted to sell to the defendant, or as an action to recover the liquidated damages mentioned in the contract, the action must fail, for the reason that McEachron did not perform, and was not able to perform, on his part.

If the action be treated, as it was on the trial, as one to recover damages for a conspiracy between the defendant and Patrick to defraud McEachron out of his contract with Patrick, and to prevent the performance of his contract with the defendant, then the action must fail, because there was not

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Opinion of the Commission, per EARL, C.

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sufficient proof of such a conspiracy, and the motion to nonsuit the plaintiffs should have been granted. There was no evidence which would warrant the jury to find that Patrick absented himself from home, or refused to perform his contract with McEachron, at the instigation of the defendant.

But even if defendant had induced Patrick not to perform his contract, that alone would not make him liable to the plaintiffs for damages. He could advise and persuade Patrick not to convey the land, under his contract with McEachron, and could, by offering more, induce him to convey to himself, without incurring any liability to McEachron, so long as he was guilty of no fraud or misrepresentation affecting McEachron. If A. has agreed to sell property to B., C. may at any time before the title has passed induce A. not to let B. have the property, and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B.; A. alone, in such case, must respond to B. for the breach of his contract, and B. has no claim upon or relations with C. While, by the moral law, C. is under obligation to abstain from any interference with the contract between A. and B., yet it is one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce. But if C. makes use of any fraudulent misrepresentations, as to B., to induce A. to violate his contract with him, then there is a fraud, accompanied with damages, which gives B. a cause of action against C.; as if C. fraudulently represents to A. that B. had failed or absconded, or had declared his intention not to sell to B., and thus induces A. to sell to another.

Here there is no proof of any fraudulent representations made by defendant to induce Patrick to violate his contract with the plaintiffs.

Hence, I can conceive of no theory, upon the facts as they appear before us, upon which this action can be maintained.

The judgment must be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

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Opinion of the Commission, per LOTT, Ch. C.

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GEORGE R. DOWNING, Appellant, v. JOHN KELLY, Sheriff,  
etc., Respondent.

48	433
127	644

Where a new trial is granted in an action tried by a jury, and the record shows that questions of fact were properly before the General Term for decision, and that the order for a new trial may or could have been based thereon, this court will not review it for the purpose of reversal. Resort cannot be had to the opinions of the General Term, but it must be ascertained and determined by the record alone, whether the order was granted on questions of fact or of law.

(Argued January 8, 1872; decided May term, 1872.)

APPEAL from order of the General Term of the Supreme Court in the first judicial district reversing a judgment in favor of plaintiff, and also an order denying a new trial, and granting a new trial. The facts presenting the points decided sufficiently appear in the opinion. The case is reported below, 49 Barb., 547.

*Francis Kernan* for the appellant.

*A. J. Vanderpoel* for the respondent. Both questions of fact and of law were involved in the hearing before the General Term, and this court cannot review the order, if it can stand consistently with any view to be taken of the evidence. (*Miller v. Schuyler*, 20 N. Y., 522; *Macy v. Wheeler*, 31 N. Y., 231, 237; *Sanford v. Eighth Av. R. R. Co.*, 23 N. Y., 343.) That the order does not state the reversal was upon questions of fact, is immaterial. (*Wright v. Hunter*, 4 Alb. Law Journal, 352.)

LOTT, Ch. C. It is claimed on behalf of the respondent that the appeal in this case should be dismissed, on the ground that the order of the General Term granting a new trial was made on an appeal involving questions of fact as well as of law. It appears from the return that the defendant moved for a new trial at Special Term, upon a case made, and that the exceptions taken on the trial were ordered to be heard, in the first instance, at General Term. It is evident, therefore, that the motion for a new trial was based on questions of

## Opinion of the Commission, per LOTT, Ch. C.

fact. Indeed, the counsel for the appellant, in his supplementary brief, states that the "defendant moved for a new trial at Special Term, under section 264, for *insufficient evidence*, which was denied. After judgment defendant appealed to the General Term from the judgment and order, where questions of fact and of law were fully presented." The order of the General Term on those appeals was in the following terms: "Ordered that said *order* and said judgment be, and each of the same is, hereby vacated, revoked and set aside, and further, that a new trial of this action be had, costs to abide the event."

It is thus shown by the order itself that the new trial was granted on questions of fact as well as of law, and under a late decision of the Court of Appeals made in the case of *Wright v. Hunter* (46 N. Y., 409), in November 1871, it is not reviewable by us for the purpose of reversing it. That case at the time of the argument was not reported, but a copy of the opinion given therein was delivered to us.

The question was there fully and ably considered by Judge RAPALLO, and the rule is declared to be that if, "in a case tried before a jury, the judgment has been reversed, and a new trial granted upon questions of fact, and the proceedings have been regular, an appeal will not lie to this court."

He also says that the return made to this court must be examined for the purpose of determining whether the judgment was or *may have been* reversed on questions of fact, and declares the rule controlling such determination in the following terms: "If it appears by the return that exceptions were taken at the trial, and there was no substantial conflict as to the facts, or that no application for a new trial was made to the judge at circuit, or to the Special Term, we are justified in affirming that the General Term passed conclusively upon questions of law, no others having been properly before them, and we will review those questions; but where the return shows that questions of fact were legitimately before the General Term, and that the evidence was such that the court may have reversed the judgment on the facts, it is



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Opinion of the Commission, per LOTT, Ch. C.

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impossible to say, from the inspection of the record, that they committed an error of law in granting a new trial, though we should be of opinion that none of the exceptions were well taken."

The opinion in that case states that after the rendition of the verdict therein, a motion was made to the judge at the circuit, upon the merits, to set it aside, and for a new trial upon exceptions, and for insufficient evidence, pursuant to section 264 of the Code; that this motion was denied; that judgment was entered without prejudice to a review of the verdict on the evidence as well as the exceptions on appeal to the General Term, as if the judgment had not been entered; that, thereupon, appeals were taken to the General Term from the judgment, and also from the order denying the motion made for a new trial on the exceptions, and for insufficient evidence; that such appeal was heard upon a case setting forth the evidence, and also containing exceptions; that an order was thereupon made by the General Term reversing the judgment and granting a new trial, but not stating upon what grounds, and that a judgment was entered in conformity to such order. The appeal to the Court of Appeals was from that order, and it was dismissed on the ground that it did not present any question of law, and it was said, at the end of the opinion, that there was "no reason for depriving the defendant of the new trial he had obtained on account of his failure to obtain an entry of the grounds of decisions in the progress of reversal, there being no statute requiring or authorizing such entry to be made."

From that statement it is shown that the present case is substantially like that, and the principle fairly deducible from that decision is, that if the record shows that questions of fact were properly before the General Term for decision on the appeal to them, and that the order for a new trial may or could have been based thereon, then this court will not review it for the purpose of reversal, or, in other words, it is necessary to sustain the appeal from such an order to this court,

for such a purpose, that it shall appear by the record to have been founded on question of law only.

It is true that in the case of *Wright v. Hunter*, *supra*, the learned judge, in that opinion, after laying down the rule applicable to the review of such an order as stated by him, to which I have above particularly referred, and after stating that this case was regularly before the General Term for review, as well upon the facts as the law, and that the evidence was such as to justify a reversal upon the facts, adds, "And in addition to all this, the opinions of the court below, after reviewing the evidence and entirely approving of the rulings of the judge at the trial, states that the error was not that of the judge, but of the jury; that their verdict ought to have been for the defendant, and that therefore it should be set aside and a new trial granted;" and he then concludes: "I think that these considerations are sufficient to satisfy us that this appeal does not present any question of law, and should be dismissed for that reason."

The opinion, in the case before us, was given by BARNARD, J., and is based on the single ground that "the defendant was entitled to have his sixth request charged substantially as requested," and after the consideration of that point, he concludes with the following remark: "The conclusion arrived at, on this point, rendering a new trial necessary, I forbear to consider the question presented by the appeal upon the facts, or the other exceptions taken by the defendant." LEONARD, J., adds at the end of it the word "concur," but it does not appear for what reason Judge CLEEKE, the other judge, sitting on the argument of the case, concurred in the order from which the appeal was taken to this court.

It is claimed by the appellant's counsel that it is shown by that opinion and the concurrence of Judge LEONARD therein, that the said order was based on a question of law only. Such a conclusion does not necessarily follow from those facts. All that can properly be claimed from the remark of Judge LEONARD is, that he concurs in the reversal of the judgment, and in the ground stated therefor by Judge BARNARD, but it

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Opinion of the Commission, per LOTT, Ch. C.

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does not justify the inference that he placed his decision on that ground only. It is, however, immaterial whether he did or not. This court is not limited or restricted in the review of the case, on the appeal, to the grounds or reasons assigned in the opinion of the court below for the decision made by it. This rule or principle is well settled, and the reference of Judge RAPALLO to the opinion of the General Term must be considered as confirmatory, merely, of the conclusion and rule previously enunciated by him, and not as declaring that it may be determined and decided by what is stated therein, whether the order appealed from was founded on questions of fact or law.

My conclusion, therefore, upon the facts appearing in the record in this case, is that this appeal cannot be entertained for the purpose of reversing that order. Whether we could properly affirm it and render judgment absolute against the appellant, on his stipulation to that effect, if any of the exceptions should be found to be well taken, it is not necessary to express an opinion, as we are unable, after an examination of them, to concur in so deciding.

The order, for the reasons stated, must be dismissed, with costs.

Subsequent to the dismissal of the appeal, my attention has been called to another decision by the Court of Appeals on the question above considered, made in the case of *Sands v. Crooke* (now reported in 46 N.Y., 564), shortly after the decision in *Wright v. Hunter* (*supra*), and I have been favored by the reporter with a copy of the opinion given therein. That was also written by RAPALLO, J., and he therein, after referring to the said decision of *Wright v. Hunter*, and stating that it was there held that in cases tried by a jury, where a new trial is granted at General Term, the Court of Appeals "will not entertain an appeal from the order granting a new trial, if it appears from the return that such order was or may have been made upon questions of fact," then adds: "Where there is a substantial conflict in the testimony, and a motion for a new trial upon the evidence has been made at Special Term, or to

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Statement of case.

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the judge at Circuit, and denied, and an appeal from that order taken to the General Term, the question of the weight of evidence is properly before the General Term; and though there be also exceptions in the case, it is impossible to determine from the record that the new trial was granted upon the exceptions alone. The appellant, therefore, in such a case, fails to show that the General Term has committed an error of law in granting a new trial. If granted upon the evidence (the trial having been by a jury), its decision is not reviewable in this court." This is confirmatory of the opinion above expressed by me, that it must be ascertained and determined by the record alone whether the order was granted on questions of fact or law.

All concur.

Appeal dismissed.

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**MAURICE FITZGERALD, Trustee, etc., Respondent, v. RENSSELAER TOPPING, Appellant.**

Where in an action in the nature of a creditor's bill, brought to set aside a conveyance by the judgment debtor as fraudulent, the plaintiff obtains a verdict and judgment is perfected some months thereafter, the adjudication, so far as relates to the validity of the judgment upon which the creditor's bill was founded, dates from the time the verdict was rendered, and the judgment simply estops the parties from denying, that at that time the original judgment was a valid and subsisting one; it is not conclusive that the original judgment was unpaid at the time the judgment in the creditor's suit was perfected.

C., the trustee of an express trust, brought an action of ejectment against defendant to recover possession of the premises deeded to him in trust. In the deed it was provided that the trustee might release or sell the trust estate only under the control and direction of the Supreme Court. For the purpose of discontinuing that action, C. executed a stipulation, under seal, containing this clause: "In consideration of the consent of defendant that this suit be discontinued, I hereby release him from all claims and demands of every description relating to the property." Upon this stipulation the court granted an order dismissing the complaint. C. having died, plaintiff was appointed trustee and brought ejectment. Defendant offered the stipulation in evidence, which was objected to and objection sustained.

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Statement of case.

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*Held*, no error. The stipulation could not operate as a release or conveyance, as then it would be a conveyance in violation of the trusts, and the granting the order thereon was not a direction or sanction to such release or sale.

(Argued January 8, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial district affirming a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

This is an action of ejectment. The evidence tended to prove the following facts:

In April, 1850, James Bryson was the owner of premises in Queens county, of a lot in Livingston street, a lot in Nassau street and of three lots in Wyckoff street, Brooklyn.

On the 16th April, 1850, he conveyed all the foregoing premises by a trust deed to William Culbert.

On the 28th December, 1850, Ann Morrison, administratrix, recovered a judgment against James Bryson for \$315.65. Seabury Kissam was her attorney.

On the 21st September, 1852, an action was tried between Ann Morrison, administratrix, against William Culbert, James Bryson and wife, Thomas, Mary Ann and Isabella Bryson, and a verdict rendered for plaintiff, and on the 29th January, 1853, a judgment was rendered on said verdict adjudging the trust deed to be void as against Ann Morrison's said judgment. S. Kissam was Mrs. Morrison's attorney; Curtis & Topping were defendant's attorneys. H. P. Curtis, one of said attorneys, was guardian *ad litem* of the infant defendants. The defendant Rensselaer Topping is the father of D. H. Topping—one of the firm of Curtis & Topping.

On the 21st February, 1852, Culbert, the trustee, commenced proceedings by petition to the Supreme Court for a sale of the Queens county premises, which resulted in an order for sale, and a sale thereof to John A. King for \$1,160.

W. J. Cogswell, who acted as counsel for King in relation to that purchase, required the Morrison judgment should be

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Statement of case.

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paid and satisfied, and at a meeting held in his office between Curtis, D. H. Topping and Bryson, an amount necessary to pay the Morrison judgment and Topping's costs was reckoned up, and \$411 was paid to D. H. Topping by Cogswell for that purpose October 8th, 1852. D. H. Topping paid S. Kissam the money in satisfaction of the judgment. A satisfaction piece was promised by Kissam and subsequently delivered by Kissam to D. H. Topping.

On the 12th of February, 1856, all of Bryson's property in Brooklyn was sold by the sheriff of Kings county, by virtue of an execution issued on the Morrison judgment to the defendant, Rensselaer Topping, who received a sheriff's deed therefor, May 20th, 1857. The sheriff's certificate of sale was not filed till August 28th, 1857.

D. H. Topping died February 12th, 1856. After his death Kissam delivered to the defendant an assignment of the Morrison judgment, dated September 25th, 1852. Defendant had Bryson turned out of the Nassau street house by summary proceedings.

Instead of a satisfaction piece, a release of the judgment was given to King. An action of ejectment was commenced by Culbert, June 27th, 1857, for all the Brooklyn premises, which was discontinued November 23, 1857.

Another action of ejectment for the Livingston street property was commenced by Bryson, March 18th, 1858, and resulted in a judgment of nonsuit by reason of the trust deed, which judgment was affirmed by the General Term. The General Term held that the trust deed vested the title to the premises in the grantee William Culbert upon valid trusts.

Seabury Kissam, James Bryson, H. P. Curtis, D. H. Topping and William Culbert are all dead.

The plaintiff in this action was appointed trustee in place of Culbert and brought this action of ejectment. The issue tried before the jury was, whether the judgment in favor of Morrison was paid before the sale under the execution. The verdict was in favor of the plaintiff, being the second verdict.

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Opinion of the Commission, per EARL, C.

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There was no evidence that defendant paid anything for the assignment of the judgment, or for the premises, at the sheriff's sale. Nor does it appear how or by whom the execution on that judgment was issued.

Various exceptions were taken at the trial by defendant, which appear in the opinion.

*Joshua M. Van Cott* for the appellant. The Morrison judgment was judicially determined to be a subsisting lien on the land on the 27th of January, 1853, and plaintiff is estopped from denying that it was then unpaid. (*Candee v. Lord*, 2 N. Y., 69.) Defendant was in possession as mortgagee if not owner, and was entitled to retain it as against plaintiff. (*Calkins v. Isbell*, 20 N. Y., 150; *Robinson v. Ryan*, 25 id., 320; *Ulmar v. Pell*, 18 id., 142; *Van Druyne v. Thayer*, 14 Wend., 233; *Phyffe v. Riley*, 15 id., 248; *Watson v. Spence*, 20 id., 260; *Fox v. Lipe*, 24 id., 164.)

*D. P. Barnard* for respondent. The dismissal of the complaint in the former action is no bar because no adjudication on the merits. (*Rosse v. Rust*, 4 Johns. Ch., 300; *Harrison v. Wood*, 2 Duer., 50; *Coit v. Beard*, 33 Barbour, 357.)

EARL, C. The defendant claims title to the three lots on Wyckoff street, in the city of Brooklyn, under a sheriff's deed given upon a sale by virtue of an execution issued upon the judgment of Ann Morrison against Bryson. The plaintiff claims that that judgment was paid before the sale, and hence that the defendant took no title by his deed. Upon this issue, as to payment of the judgment, the jury has, upon two successive trials, given the plaintiff a verdict, and the General Term has refused to set the last verdict aside as against the evidence.

There is some evidence tending to show that the judgment was paid in the fall of 1852. This evidence is not as clear and conclusive as it might be, as most of the persons concerned in the transaction were, at the time of the trial, dead.

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Opinion of the Commission, per EARL, C.

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Ann Morrison recovered her judgment December 28, 1850, some months after the trust deed had been given by Bryson to Culbert, and she claimed that the deed was fraudulent and void as to her, and soon commenced proceedings to collect her judgment. She commenced an action against Culbert and Bryson and his children to set aside the trust deed as fraudulent and void as to her judgment, and upon the issue joined in that action, she had a verdict September 21, 1852; but judgment was not entered upon this verdict until January 29, 1853. After this verdict there was ample real estate that could be readily reached to satisfy this judgment, and it is quite probable that the persons interested therein paid the judgment rather than to permit a sale thereof. Upon the theory that the judgment remained unpaid, why were the proceedings to collect the judgment, which had been prosecuted so vigorously and successfully, suspended for more than three years before the sale of the land under the execution in 1856?

The evidence of the witnesses Loomis and Cogswell tends very thoroughly to show that the judgment was paid in the fall of 1852 by one of the attorneys for Bryson to the attorney of Ann Morrison, and hence, the judge at the trial committed no error in refusing to dismiss the complaint and in submitting the case to the jury. While there were some quite significant facts and circumstances inconsistent with the claim that the judgment was paid before the sale, yet there were circumstances and some evidence for the jury upon the question of payment, and it was their exclusive province to determine that question.

The learned counsel for the appellant claimed, on the argument before us, that the judgment of Ann Morrison, by which the trust deed was declared void as to her, conclusively established that the judgment against Bryson remained unpaid on the 27th of January, 1853, when the former judgment was entered. The litigation in that case ended with the rendition of the verdict on the 21st day of September, 1852; and as that verdict was based upon an unpaid judgment in favor of the plaintiff therein, the judgment in that action



## Opinion of the Commission, per EARL, C.

established the fact that at that date the judgment for the money was unpaid. The adjudication dates from that time, and the entry of judgment afterward was a mere formal proceeding to carry that adjudication into effect. The judgment may have been entered by the clerk upon his own motion or by the attorney for the plaintiff therein, *ex parte*. Suppose the entry of judgment had been delayed for years, would it, when entered, after a great lapse of time, be conclusive evidence that the judgment for the money remained unpaid? Such an effect cannot be given to it. Upon the question of payment of the money judgment, it simply estops the parties from denying that it was a valid subsisting judgment at the time of the rendition of this verdict.

On the fourth of July, 1857, Culbert, the trustee, commenced an action of ejectment to recover these lots against this defendant. That action was put at issue and noticed for trial at the circuit. Culbert was defaulted and his complaint dismissed. He moved to open the default, and the motion was granted, and an order was made referring the cause to a referee. From the order of reference Culbert appealed to the General Term, and there the action was discontinued by Culbert, he signing the following stipulation :

"I consent that this action be, and the same is hereby discontinued and dismissed, and I hereby direct E. Daly, who claims to be my attorney, to close all proceedings herein; and in consideration of the consent of the defendant that the suit be discontinued, I hereby release him from all claims and demands of every description relating to the property mentioned in the complaint.

"Dated *November 23, 1857.*

"WILLIAM CULBERT." [L. s.]

Upon the presentation of this stipulation to the General Term, the appeal in that cause was stricken from the calendar, and the complaint therein was dismissed. Upon the trial of this action defendant offered to prove this stipulation; but plaintiff objected upon the ground that Culbert had no

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Opinion of the Commission, per GRAY, C.

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authority to give any such paper, and that it was not within the issues in the cause. The court sustained the objection, and this ruling is now alleged for error on the part of the appellant.

The ruling was clearly correct. This stipulation could not operate as a release or conveyance of Culbert's title to the land, as it would be a conveyance in violation of the trusts under which he held the title, and therefore absolutely void under the provisions of the statute (1 R. S., 731, § 65), which provides that "when the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees in contravention of the trust shall be absolutely void."

Besides, the trust deed expressly provides that the trustee might "release" or "sell" the trust estate only under the control and direction of the Supreme Court, and there can be no pretence that the Supreme Court either directed or sanctioned the release or sale in this case. The court at General Term, upon the presentation of the stipulation, ordered the cause stricken from the calendar and the complaint to be dismissed. The stipulation to discontinue, which the trustees were competent to sign, was carried into effect, and it does not appear that the court was informed that Culbert was trustee or that it was in any way called upon to adjudicate in reference to a release or sale of any of the trust estate.

The appellant's counsel makes a point that the defendant was in possession of the premises as mortgagee, if not the owner, and was therefore entitled to retain it as against the plaintiff. It is a sufficient answer to this claim that it was not set up in the answer, nor in any way alluded to upon the trial; and it does not even appear that he held any mortgage upon these lots.

There are no other questions in the case which I deem of sufficient importance to notice. I have reached the conclusion that the judgment should be affirmed, with costs.

GRAY, C. The defendant was shielded in his possession of

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Opinion of the Commission, per GRAY, C.

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the premises in question by the sheriff's deed to him, unless the judgment under which the sheriff sold and conveyed had been previously paid. There was no objection made to the parol evidence given on that subject, either when it was given or by motion after the receipt was read in evidence to strike out the parol evidence, nor was the point in any way raised that the receipt was in the nature of a contract which could not be varied by parol. The amount paid exceeded by more than fifty dollars the amount of the judgment and interest. It was in evidence that, before the payment was made, a conversation was had with Topping, the attorney of the judgment creditor, and who, it seems, was then the owner of the judgment, as to the costs, exclusive of the judgment; that a computation was made as to the amount due on the judgment and the other cost; and, after they got through with it, the amount at which the whole was computed, being \$411, was paid to Topping and a receipt taken. The receipt, it is true, does not state that the sum received was in full of the judgment and costs, but that it was to be applied, so far as it would go, in payment, etc.; omitting the parol evidence that "it was to be all wiped off and closed up" by the payment of that sum, we have, from the receipt itself, evidence that the sum received was in payment so far as it would go. Parol evidence was then clearly competent to show how far it would go. If, from the evidence, it should appear that enough was paid to cover the amount contemplated, that would end the matter. Upon this point no evidence was offered on the part of the defendant. We are left, then, to recur to the evidence already given, from which it appears that the whole amount was computed, and that the sum paid covered it. Thus the question of payment in full was left open for the consideration of the jury. The grant by Bryson and wife gave the trustee the right to possess and manage the property remaining to Bryson and wife; the rents, issues and profits for the support of the *cestui que trust*, as well as the right, under the guardianship of the Supreme Court, to mortgage or sell the property, and did not confer upon Culbert the right to

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Statement of case.

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release it without the order of the court, and hence the evidence offered of Culbert's release was properly rejected.

The mere commencement and prosecution of a suit for the premises, which did not result in a judgment upon the merits either way, was quite immaterial. The court was right in refusing to charge that the receipt of Topping was no evidence of the payment of the judgment to Morrison. It was some evidence; it was evidence of the payment of \$411 to be applied to that purpose; whether it was sufficient evidence is another question. The question as to the defendant being a mortgagee in possession was not raised in the pleadings or upon the trial; nor did it appear, from any proofs or concessions, that anything remained unpaid upon any mortgage owned by the defendant. The expression of the judge to the jury did not amount to a direction to find either way upon the point being considered. The decision in *Vedder v. Fellows* (20 N. Y., 130) was not based upon the criticism pronounced upon the charge. (Id. 134.) The judgment appealed from should be affirmed.

All concur; LOTT, Ch. C., not sitting.

Judgment affirmed.

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WILLIAM P. POPE, Respondent, v. THOMAS O'HARA,  
Appellant.

S., being the owner of a block of stores numbered 1, 2, 3 and 4, respectively, constructed a railway transversely through the cellars of Nos. 1, 2 and 3 for the benefit of No. 4. He sold and conveyed to different purchasers Nos. 1, 2 and 3, reserving in the deed the railway and the right to himself and assigns to pass and repass at pleasure. Subsequently the owners of Nos. 1, 2, and 3, being desirous of extinguishing the right of way and closing up the openings for the railway, purchased No. 4. In the deed thereof S. relinquished to the grantees all his right and title to the railway, and thereupon the owner of No. 2 built a solid stone wall between it and No. 3, without objection from the owner of the latter. The owner of No. 3 having subsequently become sole owner of No. 4, claimed the right of way, upon the ground that the agreement to extinguish it was by parol and therefore void.

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Statement of case.

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*Held*, that the right of way, having been created by deed, was not extinguished by non-user, and that it was a freehold interest, but that the parol agreement, having been partially performed, was valid and operative as an equitable estoppel to extinguish the right of way.

Where a deed is introduced in evidence by one who is a stranger thereto, to prove as against a subsequent grantee an admission by the parties to the conveyance, the grantee is not estopped from proving that the provision relied upon was inserted in the deed by mistake.

The use of the word appurtenances in a deed does not recognize or recreate an extinguished right of way across adjoining premises.

A fire having occurred which destroyed the wall between Nos. 2 and 8, plaintiff, the owner of No. 2, and defendant, the owner of No. 8, entered into a contract by which plaintiff agreed to build a wall upon the same foundation, defendant to pay one-half the expense. Plaintiff built up a solid wall as before. *Held* (Lott, Ch. C.), that the writing controlled and estopped defendant from questioning acts done under it, and, therefore, from claiming a right of way.

(Submitted January 8, 1872; decided May term, 1872.)

APPEAL from a judgment of the General Term of the Supreme Court in the sixth judicial district, affirming a judgment in favor of the plaintiff entered upon a decision of the court at Special Term.

This action is for the recovery of one-half of the expense of taking down a wall standing wholly on the plaintiff's land, and rebuilding it, to be used as a party wall between the building of the plaintiff on the east and the defendant on the west, under a written contract for that purpose. The defendant answered, alleging that he had a right of way easterly through the plaintiff's cellar, and the right to the use of a railway running easterly and westerly through the cellars of both houses, and that the plaintiff, in constructing the said wall, had closed up the said railway, and thereby entirely obstructed its use, to the great damage of the defendant.

The action was tried before the court, a jury having been waived. It appeared that the parties were the owners of adjacent buildings in Binghamton, occupied as stores. The plaintiff's store was burnt, and the west wall thereof, being a continuous wall from front to rear, standing entirely on his land, and forming the east wall of the defendant's store,

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Statement of case.

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was so injured by the fire as not to be fit for use in rebuilding, and the plaintiff determined to take it down. The parties thereupon entered into an agreement under seal, whereby the plaintiff agreed to take down the wall and build a new one of the old materials and such new ones as should be necessary, upon the same foundations, and on its completion convey to the defendant the west half of said wall and the ground on which it should stand when completed; and the defendant agreed to pay to the plaintiff one-half of the expenses, as the work progressed, of taking down and clearing the old materials and of furnishing the new materials, and putting up the wall upon the old foundations. The plaintiff having taken down the old and rebuilt the cellar portion of the new wall, rendered to the defendant an account of the expense, and demanded payment of one-half, which the defendant refused to pay. The judge found that in March, 1851, the right of railway existed from the Chenango canal extending westerly through the cellars of four adjoining stores, known as Nos. 1, 2, 3 and 4 Ely place, No. 4 belonging to Strong, No. 3 to the defendant O'Hara, No. 2 to Gregory and No. 1 to Sisson. That Sisson, Gregory and O'Hara were then all desirous of getting rid of this railway and closing it up. That Strong owned No. 4, and had the right of way under all three of the other stores. That Sisson, Gregory and O'Hara, for the purpose of extinguishing the railway, agreed among themselves, in March, 1851, that they would jointly purchase Strong's store, No. 4, and extinguish and close up the railway. They accordingly made the purchase of Strong. After this purchase, Gregory, who owned No. 2, while O'Hara owned No. 3, built a solid wall of stone masonry, two and one-half feet thick, between his store and that of O'Hara, who made no objection at the time of his right to do so, nor did he make any complaint against it until 1854, when the plaintiff Pope proposed to purchase of O'Hara store No. 4, of which at that time he had become the sole owner, and Pope declined to complete the purchase unless O'Hara would convey and guarantee to

## Statement of case.

him the right to use this railway. That O'Hara then complained to Gregory for closing up the railway, and insisted it should be opened; and Gregory claimed it was rightly closed, and that he would not open it. The same condition of things remained, the wall still up, until the fall of 1862, when the stores Nos. 1 and 2 having been burned down, the plaintiff and defendant entered into the said contract for taking down the old wall and erecting the new one. That the contract makes not the least allusion to any railway, but seems clearly to require the new wall to be build solid like the old one, and without any railway opening; and O'Hara stood by and saw the wall erected some few feet, where the railway opening used to be, without any objection, and saw Sisson's wall laid up over where this railway used to run, without any remonstrance. That Sisson planked and spiked up the railway between Nos. 1 and 2, and Webster, a tenant of O'Hara, planked up a close partition between Nos. 3 and 4.

The justice found, upon these facts, that the railway must be held to have been extinguished, and that the defence entirely failed, and that it was very questionable whether the language of the written contract, "that the said wall shall be erected on the present foundation," entered into between the parties to this action, does not estop the defendant to set up his claim; that there was enough to constitute an equitable estoppel against the defendant.

The judge thereupon directed judgment for one-half of the said expenses, with interest from the commencement of the action, amounting together to \$148.17, with the costs. Other facts appear in the opinion.

*L. Seymour* for the appellant.

*O. W. Chapman* for the respondent. Defendant is estopped by the contract on which this suit is brought. (*Dezell v. Odell*, 3 Hill, 222; *Carpenter v. Silwell*, 12 Barb., 128.) Defendant is estopped by his acquiescence and participation

Opinion of the Commission, per LEONARD, C.

in the various acts significant of the mutual abandonment of this right of way. (*Corning v. Gould*, 16 W. R., 581.) Equity would enforce the agreement, after a part performance, although it was not in writing. (*Malins v. Brown*, 4 N. Y., 404; Story's Eq. Jur., § 759; *Lowry v. Tew*, 3 Barb. Ch., 407; *Lobdell v. Lobdell*, 36 N. Y., 327.) A parol agreement to shut up a right of way after it is executed is valid. (2 Par. on Cont., 315; *Thomas v. Dickinson*, 12 N. Y., 371, 372.) The statute of frauds has no application here. (3 Kent's Com., 449, mar. p.; *Corning v. Gould*, 16 W. R., 531, 542; *Orain v. Fox*, 16 Barb., 184.) There is no estoppel as between a party to a deed and a stranger. (*Arville v. Willson*, 4 Barb., 190; *Sparrow v. Kingman*, 1 N. Y., 248; 1 Greenl. on Ev., §§ 211, 23 u, 279; 7 Bac. Abr., 620; 2 Halst. on Ev., 39, §§ 257, 258; *Whitbeck v. Whitbeck*, 9 Cow., 266; *Dwight v. Pearl*, 24 Barb., 57.) The rule that you cannot contradict a writing by parol applies only in suits between parties to the instrument. (1 Green. on Ev., § 279; *Reynolds v. Magness*, 2 Iredell, N. O., 26.) The right of way became extinct by operation of law. (2 Bouvier's Insts., 172; Gale & Whately on Easements, 7-252; *Whately v. Thompson*, 1 Bos. & Pull., 371.)

LEONARD, C. The agreement of March, 1851, to extinguish the right to use the railway running transversely through the cellars of the four stores on Ely place, Binghamton, was found by the judge before whom the action was tried at the circuit, on parol evidence, and an exception was there taken to its admissibility, and it must be conceded that if such evidence was illegally admitted, the fact of the agreement so found is not sustained by testimony.

It will be necessary briefly to consider the evidence relating to the origin of the right, so as to ascertain the true aspect of the question. Cyrus Strong is the common source of title of the four stores, and appears to have constructed the railway for the purpose of transporting heavy freight over it from the Chenango canal to each of them. The stores were numbered



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Opinion of the Commission, per LEONARD, C.

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respectively 1, 2, 3 and 4, and No. 1, adjoined the tow-path of the canal on the east, and the servitude appears to have been due from the stores nearest the canal, having the smaller numbers, to those situated westerly therefrom, and having the larger numbers. The first conveyance was of No. 1 from Strong to Benjamin F. Sisson, in March, 1849, but it appears from the deeds that an earlier contract was made by Strong for the sale and conveyance of No. 2 to George W. Gregory. In April, 1850, Strong conveyed No. 3 to the defendant, Thomas O'Hara. The railway is referred to in these deeds, and also in that conveying No. 3 to Gregory, in substantially the same terms. The following, as a sample, is from the deed of No. 3, to O'Hara, viz.: "The said Cyrus Strong excepting and reserving the railway in the cellar of the premises conveyed, with the right to him and his heirs, or assigns, at all times to pass or repass at their pleasure." The said three persons, Sisson, Gregory and O'Hara, so owning and occupying the said stores, Nos. 1, 2 and 3, united in purchasing from Strong the store No. 4, which he conveyed to them by deed, April 1, 1851, in which the railway is mentioned as follows, viz.: "The said Cyrus Strong also hereby releases *by*" (meaning "to") "the parties of the second part, all his right and title to the railway in the cellars of the adjoining premises heretofore conveyed to Benjamin F. Sisson and Thomas O'Hara, and contracted to be conveyed to George W. Gregory." It thus appears that Cyrus Strong constructed the railway while he was the owner of all the stores; that he reserved the right to use it, to himself, his heirs and assigns, by each of the deeds conveying stores Nos. 1, 2 and 3, and that each of the successive grantees of Nos. 2 and 3 took the right of common use of the railway by their deeds as the assignee of Strong, while he still remained the owner of store No. 4, having the dominant right to the use of the way as such owner, and that by his deed of No. 4, in March, 1851, he released the entire right of way so that Sisson, Gregory and O'Hara became the owners of the way exclusively. The mode adopted is a very inartificial one for creating a right of way or easement, by

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Opinion of the Commission, per LEONARD, C.

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deed or grant, but such is the fair intent and construction. It is the general rule that a right of way or easement acquired by deed, can be extinguished only by a deed. A right acquired by prescription may be lost by non-user, but not when acquired by deed. (*Jewett v. Jewett*, 16 Barb. R., 150; *Smyles v. Hastings*, 22 N. Y. 217, 224.) A right of way created by deed is a freehold interest, if the grant be to heirs and assigns. (Kent's Com., 419, marg.) Were there no exceptions to the general statutory rule forbidding an estate or interest in land to be granted, assigned, surrendered or declared unless by operation of law, or by deed in writing, subscribed by the party, it is entirely clear that the evidence would not support the finding of an effective or valid agreement to extinguish the right of way here claimed by the defendant. (2 R. S., 134, § 6, marg.) The tenth section of the same chapter and title provides that the powers of courts of equity to compel the specific performance of agreement in cases of part performance thereof are not abridged by anything in that title contained. In my opinion the present case is an exception to the general rule referred to.

It appears from the facts found by the judge below that the agreement to extinguish the way, and to purchase the store No. 4 for that purpose, were one and identical. He finds that "in March, 1851, Gregory, Sisson and O'Hara, for the purpose of extinguishing the railway, agreed among themselves that they would jointly purchase Strong's store, No. 4, and extinguish and close up this railway."

Chancellor WALWORTH says: "The principle upon which courts of equity hold that a part performance of a parol agreement is sufficient to take a case out of the statute of frauds, is that a party who has permitted another to perform acts on the faith of an agreement shall not be allowed to insist that the agreement is invalid because it was not in writing, and that he is entitled to treat those acts as if the agreement, in compliance with which they were performed, had not been made." (*Lowry v. Tew*, 3 Barb. Ch. R., 413.)

It is said in an analogous case that it would operate as a

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Opinion of the Commission, per LEONARD, C.

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fraud, unless the agreement was carried into execution. (*Malins v. Brown*, 4 N. Y., 404, 407; *Lobdell v. Lobdell*, 36 N. Y., 327, 331; 3 Parsons on Contracts, 359; Story's Eq. Ju., § 759.) These authorities fully sustain the application of the equitable rule in this case.

The defendant united with Gregory and Sisson to purchase the store No. 4, in the faith and confidence that the railway was to be extinguished.

The dominant premises, store No. 4, to which the three others were servient, was purchased, the money of the parties paid, not more for the purpose of acquiring that store than to extinguish the railway. The purpose was carried into effect by Gregory, and the way was closed by a substantial wall of stone and mortar soon after the store No. 4 was purchased, and so remained at the time the plaintiff purchased store No. 2 of Gregory in 1858, and continued until taken down under the said agreement in 1862. It is found that the purpose of extinguishing the railway was the object of the parties. It may well be said, if that object is defeated, it would operate as a fraud upon Sisson and Gregory and their assignees. The plaintiff, as the assignee of Gregory, must be held entitled to the benefit of the extinguishment of the way, so far as it pertained to the premises which were conveyed to him by Gregory or his assignees.

It is urged that secondary evidence was improperly admitted to prove that a provision was inserted by mistake in the deed from Gregory to the plaintiff, executed in 1858, "excepting and reserving the railway and track through the cellar, to be at all times open for the use of the grantor and his assigns." This deed was introduced in evidence by the defendant, and was relied on to prove an admission by the parties to the deed, Pope and Gregory, that the right of way was in existence in 1858, when it was executed, and as tending also to impair the credit of Gregory, as a witness for the plaintiff, to prove the agreement between O'Hara, Sisson and Gregory, in 1851, for the extinguishment of the railway.

It is to be observed that O'Hara is a stranger to this deed.

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Opinion of the Commission, per LEONARD, C.

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As between the parties to that deed, there was no dispute. They were agreed that the provision was there by mistake, and without any agreement having been made between them that there was any such right in existence or to be reserved. The plaintiff was not estopped from proving the mistake as against O'Hara, the defendant, who was a stranger to the deed. (1 Greenleaf's Ev., § 211.)

It should be observed that this deed makes a reservation simply, and does not declare that the premises are subject to a right of way in favor of other premises, nor of any person except the grantor and his assigns; it is a *reservation* of a right to the grantor and his assigns only, where the grantor had no premises to which the right could attach, either in his own favor or in favor of an assignee. This is a circumstance strongly corroborating the evidence as given, that the mistake occurred by employing a scrivener who copied the deed from that of Strong to Gregory, and was not read by the parties to the deed.

The deed from Strong to Gregory in 1853, which contains the reservation of the right of way in the cellar in the same form, substantially, as those to Sisson and O'Hara for stores Nos. 1 and 2, having been executed subsequent to the alleged extinguishment of the easement, is urged as a record admission by Gregory of such importance as to estop him and his assignees from making such claim.

Mr. Strong had conveyed the three other stores with the right of way, and, as the right had never been extinguished by deed, he could not be entirely safe against liability on his deeds for the other stores, in respect to such right, unless he made his conveyance of No. 2 to Gregory, so as to continue the right of way. The reservation of the right by the deed to Gregory did not revive or re-create a right in favor of O'Hara, nor did it injure or affect the rights acquired by the parties to the agreement of March, 1851, for the purchase of store No. 4 and the extinguishment of the easement. The defendant was at liberty to urge, at the trial, such consideration for the deeds from Strong to Gregory, and from Gregory

to the plaintiff, tending to affect the degree of credit to be given to the evidence of Gregory and the plaintiff, as they appeared to demand; but the facts, having been found upon competent evidence, are considered conclusive in a court having the review of errors of law only, and cannot be here examined.

The cases of *Corning v. Gould* (16 Wend. R., 531) and *Crain v. Fox* (16 Barb. R., 184) were urged upon our attention by counsel, but they are not believed to be applicable to the present case. In those cases an obstruction to the easement, erected or created by a party to whom the servitude was due in whole or in part, or by the owner of the dominant estate, was held to extinguish the right. And it was correctly observed by the counsel for the appellant that those cases are in vindication of the rights of purchasers in good faith while the easement was so obstructed.

O'Hara, the owner of No. 3 and also of No. 4, by deeds from Sisson and from the assignees of Gregory for their two-thirds interest in store No. 4, holding the dominant estate until the easement was extinguished, has not erected or created any obstruction to the enjoyment of the right. The present case is distinguishable from those referred to above in this respect. I will briefly mention two other subjects supposed to entitle the defendant to a new trial.

The intermediate deeds from Gregory and his assignees to O'Hara, for the one-third interest of Gregory in store No. 4, contain no reference to the railway, but do grant the appurtenances. The use of the word *appurtenances* in those deeds has been correctly held not to recognize or create a right of way across No. 2 after the right had been extinguished by the prior agreement of 1851.

The deed of Sisson to O'Hara for his one-third interest in store No. 4 is dated in April, 1853, and conveys all the right to the railway, and the right to pass and repass, which he acquired by the deed for that store executed by Strong, April 1st, 1851.

That deed from Sisson could create no right of way in the

## Statement of case.

cellar of store No. 2, if the right had been previously extinguished, as it has been found to have been, by the agreement of March, 1851.

These deeds, like some of the others before mentioned, might be supposed to have affected, in some degree, the credit of some of the plaintiff's witnesses who testified to the agreement for the extinguishment of the right of way, but their weight as evidence has been passed upon by the court below, and found not to sustain the claim of the defendant.

The evidence of a parol agreement having been properly admitted and found to be valid, and operative as an equitable estoppel to extinguish the right of way claimed by the defendant, by reason of its part performance, the judgment appealed from should be affirmed with costs.

All concur.

LORT, Ch. C., concurs on the ground that the writing between the parties controls and estops defendant from questioning acts done under it.

Judgment affirmed. ✓

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ROBERT J. RANDOLPH, Appellant, v. JOHN LOUGHLIN,  
impleaded, etc., Respondent.

Where, in an action upon a written instrument, the issue is as to the genuineness of the signature thereto, other papers executed by defendant, the signatures to which are conceded to be genuine, but which are not properly in evidence for other purposes, cannot be received in evidence or submitted to the jury to enable them to compare the signatures, and thus draw a conclusion as to the genuineness of the one in question.

(Argued January 8, 1872; decided May term, 1872.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial district, reversing a judgment in favor of the plaintiff entered upon a verdict and reversing an order denying a new trial, and granting a new trial.

The action was upon a promissory note alleged to have

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Opinion of the Commission, per EARL, C.

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been executed by defendant John Loughlin; defendant denied the making of the note. The facts are sufficiently stated in the opinion.

*Joshua M. Van Cott* for the appellant. Defendant is liable if he adopted the signature or so conducted himself as to induce plaintiff to rely upon it. (*Morris v. Bethell*, L. R., 5 Com. Pleas, 50; *Weed v. Carpenter*, 10 Wend., 403; *Hazard v. Spears*, 4 Keyes, 482.) The jury were correctly instructed to compare the notes to determine the genuineness of the one in suit. (*Dubois v. Baker*, 30 N. Y., 355; 1 Greenleaf's Ev., § 578; *Doe v. Newton*, 5 Adolph & Ellis, 514; *Van Wyck v. McIntosh*, 4 Ker., 442.) The reversal was for a supposed error of law. (*Marco v. Liverpool & London Ins. Co.*, 35 N. Y. R., 664; *Baldwin v. Van Deusen*, 37 N. Y., 487.) The signatures were not before the General Term, and that court was not in a situation to revise the judgment of the jury on the question of fact. (*Birdsall v. Russell*, 29 N. Y., 241-244.)

*E. M. Cullen* for the respondent. The court erred in admitting the notes in evidence and in permitting them to be given to the jury for the purpose of comparison. (*Van Wyck v. McIntosh*, 4 N. Y., 439.)

EARL, C. The sole controversy upon the trial of this action was whether the respondent executed the note in suit, or whether his signature to it was a forgery. Upon this question there was very little, if any, competent evidence showing that he executed the note, and the evidence was very strong that he did not.

The Special Term was authorized to review the findings of the jury upon questions of fact under section 256 of the Code, and, upon the appeal to the General Term from the order of the Special Term, the General Term had the same authority. But if the General Term granted a new trial upon questions of fact, no appeal could be taken to the Court of Appeals

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Opinion of the Commission, per EARL, C.

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from the order granting the new trial. This is finally settled by the Court of Appeals in the case of *Wright v. Hunter*, decided November, 1871 (since reported in 46 N. Y., 409), in which Judge RAPALLO, writing the opinion of the court, has carefully reviewed the various provisions of the Code and the prior decisions upon the subject. Must the General Term, in this case, be presumed to have granted the order setting aside the verdict and for a new trial upon questions of fact? The rule to determine this, as laid down in the case above cited, is this: When the new trial is granted in a case which involves only questions of law, or in which the General Term has no right to review the questions of fact, the Court of Appeals will presume that questions of law were exclusively considered at the General Term, and will consider such questions. But where questions of fact were involved, and the case was such, and was before the General Term in such form that it could review the questions of fact, and hence may have granted a new trial upon questions of fact, an appeal to the Court of Appeals brings up nothing for review, and hence is improper and unauthorized.

This case was properly before the General Term for review upon the facts, and it was a case in which a new trial may have been granted upon the facts. The opinion delivered at General Term shows that one of the reasons, and the principal one, for granting a new trial was, that there was not competent evidence to establish the fact that the respondent executed the note in suit.

Hence we might hold that there was nothing before us for review, and dismiss the appeal; but the point was not discussed or taken in the argument before us, and hence we have concluded to dispose of the case upon the merits.

The suit was upon a single note purporting to have been made by the respondent, the signature to which he claimed to be a forgery. The plaintiff was permitted, against the respondent's objection upon the trial, to put other notes in evidence purporting to be made by him, the signatures to some of which were admitted to be genuine, and to others claimed to



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Opinion of the Commission, per LEONARD, C.

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be forgeries. I am unable to see how these other notes were competent evidence, and what possible bearing they could have upon the issues upon trial. As they were not competent evidence for any other purpose, they could not be received in evidence to enable the jury to compare the signatures to them with the signature to the note in suit. That such evidence is incompetent is well settled. (*Van Wyck v. McIntosh*, 14 N. Y., 439; *Dubois v. Baker*, 30 N. Y. 355.)

The court permitted the counsel for plaintiff to deliver four notes, besides the one in suit, to the jury, and charged them, among other things, as follows: "One of the principal questions for you to consider will be, was the note made by the defendant in person? The defendant, Bishop Loughlin, positively denies this, and the plaintiff has sought to disprove this denial, claiming that the note and signature are in the proper handwriting of the defendant, and that this appears from comparison with the handwriting of other notes and their signatures, proved in the case and acknowledged as genuine, such as notes B and C. You are to make such comparison, and determine whether the resemblance is so perfect and exact as to convince you of the genuineness of the signature, notwithstanding the defendant's positive denial." This charge was clearly erroneous.

The General Term, therefore, committed no error in granting a new trial, and its order must be affirmed, and judgment absolute rendered against the plaintiff, with costs.

LEONARD, C. When the case was rested on the part of the plaintiff, there was no evidence of the making of the note in suit. That was the issue to be proven. The defendant by his answer denied that he made it. Although the defendant did not think proper to submit his case on the evidence as it then stood, the subsequent testimony did not prove the making of the note. The defendant, as a witness in his own behalf, testified that he did not make or authorize it. The plaintiff endeavored to prove sufficient to authorize the case to go to the jury, by an examination of the defendant. Two

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Opinion of the Commission, per LEONARD, C.

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notes, of \$1,500 each, were shown to him, one dated the 6th and another the 22d of October, 1863; and on inquiry by the plaintiff he testified that the body and signatures were all written by him. Two other notes, for \$1,500 each, dated January 22d, 1864, were shown to the defendant, and he was asked to look at the body of those notes, and also at the body of the note in suit, and say whether they were in the same handwriting; and also whether the signature "J. Loughlin," by whom they purported to be signed as maker, were in the same handwriting. An objection to these inquiries was overruled and the defendant excepted. The defendant answered that he could only judge by comparison, and from that he should judge that they resembled each other.

The defendant was then asked if the two notes dated in January, 1864, were presented to him by Mr. Bergen, as notary, for payment. Objection having been overruled and exception taken, he answered that he did not recollect anything of the kind happening. Mr. Bergen testified, as a witness for the plaintiff, that he presented the notes to the defendant, and said to him, "These are your notes;" to which the defendant replied, "I know it, but O'Donnell will pay them; take them to him."

The two notes last mentioned were then read in evidence, against an objection and exception taken by the defendant.

It is entirely clear that not one word of this evidence was material or competent. When the case was submitted to the jury the judge told them they might compare the note in suit with the notes dated in October, 1863, and determine whether the resemblance was so exact and perfect as to convince them of the genuineness of the signatures, notwithstanding the positive denial of the defendant. These notes were placed in the hands of the jury for that purpose, and the defendant duly excepted.

The comparison of handwriting is permitted, where different instruments relevant to the controversy have been introduced for other purposes. (*Van Wyck v. McIntosh*, 14 N. Y., 442; *Dubois v. Baker*, 30 id., 355.)

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Opinion of the Commission, per LEONARD, C.

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But in the present case the notes dated in October, 1863, were introduced for no purpose but that of comparison.

The plaintiff has suggested that they were competent to show the course of dealing between the maker and the indorser. There was no dispute on that point. The defendant had for several years previous to October 22d, 1863, loaned his paper to O'Donnell for large amounts. That fact did not, however, tend to prove the genuineness of the defendant's signature to the note in suit, nor authorize the use of the name of the defendant, nor estop him from denying it as spurious. The evidence of Mr. Bergen was wholly immaterial and incompetent; nor does it appear that the judge or counsel authorized or suggested any use of the said October notes as evidence, except for the purpose of comparison.

The January notes were also submitted to the jury as evidence tending to prove an authorization, and of leading parties to believe the note in suit to be genuine.

In addition to the evidence of Mr. Bergen, it appeared that Mr. Farran, a broker's clerk, called on the defendant with the notes after they had been sold, and in answer to an inquiry by Mr. Farran, the defendant stated that he would see Mr. O'Donnell, and have him attend to the notes.

I am wholly at a loss to perceive how an authorization, or anything tending to lead parties to believe the note in suit to be genuine, could be legitimately drawn from the evidence of Mr. Bergen or Mr. Farran. The claim amounts to this: that, although the note in suit and the two notes of January, 1864, be conceded to have been forgeries, that the omission of the defendant to make that claim when the notes were shown to him, and repudiate them on that ground, justifies the inference that they were authorized, or that parties were led thereby to believe them to be genuine. This would be true only in case the plaintiff had been proven to have received the note in suit after such conversations. But no such evidence was offered. There was nothing tending to connect the evidence of Bergen or Farran with the case. It cannot

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Statement of case.

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be claimed that their evidence was material or competent to contradict the defendant as a witness, because it related to a collateral and immaterial issue.

There were other errors in the admission of evidence, but those which have been mentioned were quite sufficient to require the reversal of the judgment entered on the verdict.

On the plaintiff's stipulation, the judgment must now be absolute, with costs.

All concur; LOTT, Ch. C. not sitting.

Order affirmed, and judgment accordingly.

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PETER REED, Appellant, v. THE UNITED STATES EXPRESS  
COMPANY, Respondent.

Where an express company agrees to *forward* a package to a point beyond the terminus of its route, the contract expressly limiting its liability to that of forwarders, and through charges not having been paid, the liability of the company as a common carrier ceases at the end of its route, and if the package arrives there in safety and is delivered with proper instructions to another responsible carrier upon the line to the point of destination, its liability ceases. The equivalent of the words "to forward" is "to send;" not "to carry." (HUNT, C., and LOTT, Ch. C., dissenting.)

When the receipt given by an express company and containing the contract is lost, but a sworn copy thereof is produced, an entry of the transaction made in the books of the company by the clerk receiving the package is not competent evidence for the purpose of showing what the contract was, nor is evidence of the custom of the company to make a special entry in cases of contracts of the nature of the one claimed, and that in the case at bar there was no such entry. (GRAY and LEONARD, CC., dissenting.)

Where the preliminary proof of loss and of comparison, has been given to make a copy of a contract evidence, the copy is legally of as high an order of proof as would have been the original, and parol proof cannot be given to weaken or alter the contract thus established. (GRAY and LEONARD, CC., dissenting.)

(Argued January 8, 1872; decided May term, 1872.)

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Statement of case.

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APPEAL from order of the General Term of the Supreme Court in the fifth judicial district, setting aside a verdict in favor of plaintiff and ordering a new trial.

This action was brought to recover damages for an alleged breach of an agreement to transmit a package of currency from Chicago to the Bank of Dalton, Georgia, for redemption, and to return the proceeds. Plaintiff delivered to the defendant's money-receiving clerk, at its office in Chicago, a package containing \$904 in the bills of the Planters' and Mechanics' Bank of Dalton, Georgia, saying that he wished it sent to the bank for redemption, and that his object was to have it redeemed or returned. It did not appear what, if anything, was said to the clerk as to what bank issued the bills contained in the package, or what instructions, if any, were given as to the marking or directing it. The clerk marked and receipted it. The plaintiff having lost the receipt, gave in evidence what as he testified was a true copy of it, which bore date December 10th, 1858, and read as follows: "Received of Peter Reed one package, said to contain currency valued at \$904, and marked Bank of Dalton, Georgia, for redemption, which we undertake to forward to Dalton, perils of navigation excepted; and it is hereby expressly agreed that the United States Express Company are not to be held liable for a loss or damage, except as forwarders only." Upon the left margin of the receipt was the following: "The United States Express Company will forward bank notes, gold and silver, merchandise and packages, and collect notes, drafts and accounts, daily, between New York, Philadelphia, Boston, Albany, Buffalo, Dunkirk, Cleveland, Detroit, Dayton, Cincinnati, Sandusky, Toledo, Chicago, Rock Island, St. Louis, Iowa City, Kansas City, Omaha City, and other principal towns and cities of the west and south-west, California and Europe." No charges were paid. The clerk who received and receipted the package was sworn as a witness for defendant, and testified that he had no distinct recollection of the occurrence further than that the plaintiff brought a package of money there to send to Georgia, and that he receipted it

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Statement of case.

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and billed it to Buffalo, which was then, by a regulation of the company, a rebilling office; that when he received the package and receipted it, he made an entry, containing the transaction, in the book of the company. This entry defendant offered in evidence, claiming that, in the absence of the original receipt, it afforded some evidence of the terms upon which the package was received and forwarded. Upon objection it was excluded, and the defendant excepted. Defendant proposed to prove that it was the practice of the office to enter the fact in the book, in cases where they were to make collections, and that in this instance there was no entry of redemption or collection, which offer was objected to and rejected, and defendant excepted. The defendant proved that it had no route south of New York, and proved by an entry in the books of Adams Express Company, that the package in question was, on the 14th of December, 1858, forwarded by that company from New York to Augusta, Georgia. The evidence being closed, the defendant moved that the complaint be dismissed upon the ground that it did not appear by the receipt that the defendant undertook to carry the money to the Bank of Dalton, Georgia, and return the proceeds as alleged in the complaint. The motion was denied and the defendant excepted. The defendant then insisted that, by the terms of the receipt, its obligation was simply that of a forwarder, and that upon the face of the receipt it appeared that the company had no route south of New York, and asked the court to charge the jury that if they believed that the defendant delivered the package to Adams Express Company in the city of New York on the 14th of December, 1858, that its obligation as a carrier was then ended. The court ruled to the contrary, "because" (as the court stated) "here is an express company receiving a package and giving a receipt to carry it through to Dalton, Georgia;" to which ruling the defendant excepted. The jury rendered a verdict in favor of the plaintiff for \$1,205.34. The case and exceptions were ordered to be heard, in the first instance, at the General Term.

## Statement of case.

*Geo. N. Kennedy* for the appellant. The parol evidence of what took place at time of delivery of package was competent to explain receipt. (*Quinby v. Vanderbilt*, 17 N. Y., 306.) Defendant, in refusing to account for the property, was liable. (*Muschamp v. Lancaster and Preston Junction Railway Co.*, 8 Mees. & Wels., 421; *Watson v. Ambergate Railway Co.*, 3 Eng. L. & Eq. R., 497.) An undertaking by a common carrier to forward makes him liable for delivery at place of destination. (*Sohnoder v. H. R. R. Co.*, 5 Duer, 55; *Chrislerman v. Am. Ex. Co.*, 2 Amer. R., 122.) Plaintiff was induced to believe, by acts of defendant's agent, that it carried through. (*Fairchild v. Slocum*, 19 Wend., 329; *Weed v. The Saratoga Railroad Co.*, 19 Wend., 534; *Van Santvoord v. St. John*, 6 Hill, 161; *Hart v. Rensselaer and Saratoga R. R.*, 4 Seld., 37; *Judson v. W. R. R. Co.*, 6 Allen, 489; 2 Redfield on Railways, 22, 93.) Defendant is to be regarded as a common carrier. (*Sweet v. Barney*, 23 N. Y., 335.) It cannot, by notice or exception in a receipt, exempt itself from liability for negligence. (*Belger v. Am. Ex. Co.*, 51 Barb., 69; *Buckland v. Adams Ex. Co.*, 97 Mass., 124.)

*Sherman S. Rogers* for the respondent. The entry made by defendant's agent was competent evidence. (*Guy v. Mead*, 22 N. Y., 462; *Marchy v. Shultz*, 29 id., 346; *Brown v. Jones*, 46 id., 400; *Halsey v. Sinsebaugh*, 15 id., 485; *Kennedy v. Crandall*, 3 Lansing, 3; *Russell v. Hudson R. R. Co.*, 17 N. Y., 134.) Defendant's contract, at most, was to carry over its own route, and at the terminus deliver for further carriage to some other responsible carrier. (*Van Santvoord v. St. John*, 6 Hill, 157; *Gould v. Chapin*, 20 N. Y., 260; *McDonald v. Western R. R.*, 34 id., 497; *Hempstead v. N. Y. Central R. R. Co.*, 28 id., 485; *Dillon v. N. Y. and E. R. R.*, 1 Hilton, 231; *Wright v. Boughton*, 22 Barb., 561; *Nutting v. Conn. River R. R. Co.*, 1 Gray, 502; *Elmore v. Naugatuck R. R. Co.*, 23 Conn., 457; *Parsons' Merc. Law*, 218; *Edwards on Bailments*, 504.)

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Opinion of the Commission, per GRAY, C.

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GRAY, C. That the defendant's route from Chicago in the direction of Dalton, Ga., terminated at the city of New York, was an undisputed fact, and if it had been necessary to prove that the plaintiff, at the time of leaving his package with the defendant, knew that fact, and that the defendant had no interest in or control over any route between New York and Dalton, the evidence was quite sufficient to justify such a finding. The fact that the defendant, within four days after the receipt of the package, delivered it to the Adams Express Company to be forwarded as directed, does not seem to have been questioned at the trial, nor was any question made as to the responsibility of that company. All these facts were substantially conceded by the learned judge at the circuit, who refused to recognize the general principle that the obligation of an express company is simply to carry safely to the end of its own route and then deliver its freight in the condition in which it was received to the next carrier upon the line with proper directions (see 2d Redfield on Law of Railways, 4th ed. sub. 14 of § 169, p., 23, as applicable to this case), "because," as he said, "here is an express company receiving a package and giving a receipt to carry it through to Dalton, Georgia;" and upon this ground alone he placed the plaintiff's right to recover. Such was not the language of the receipt; the undertaking was to forward the package (not to carry it) to Dalton, and by the terms of the receipt its liability was expressly limited to that of a forwarder. If, therefore, its language can be construed into an undertaking to do otherwise than forward, or, in equivalent language, send it by another safe line from the termination of its own line, there should be something in the surrounding circumstances indicative of the defendant's intention that the plaintiff should understand from the terms of the receipt that it intended to become liable for the negligence of the connecting lines between the termination of its own line and Dalton, in which it had no interest and over which it had no control. There was not even evidence that there were competing lines



## Opinion of the Commission, per GRAY, C.

between Chicago and Dalton, or any circumstance, however slight, contributing to the establishment of any motive or interest which could have prompted such an undertaking. The charges from Chicago to Dalton were not paid, as in the case of *Weed v. The Saratoga and Schenectady Railroad Company* (19 Wend., 535), and if the cotemporaneous entry of the transaction, made in the defendant's books, had not been erroneously rejected (*Barker v. The N. Y. C. R. R. Co.*, 24 N. Y., 599), it would have appeared that the defendant's only charge for its services was one dollar, a moderate price for transmitting the package over its own line from Chicago to its termination in New York. It was urged that, by a just interpretation of the language of the receipt, it was apparent that the defendant's engagement was to carry the package to Dalton, present it at the bank for redemption, and receive and return the proceeds, and, if it was not redeemed, to return the package. The original receipt was not produced. Secondary evidence of its contents furnished by the plaintiff was its substitute, the accuracy of which was not conceded by the defendant. If the secondary evidence is susceptible of the construction the plaintiff claims for it, the court erred in not permitting the defendant to prove the contents of the cotemporaneous entry of the transaction, in which it did not appear that the contents of the package was received, and to be, by the defendant, presented for redemption, in connection with the evidence offered of the custom of the office, whenever the company was to make collections, to enter that fact on its book as a part of the transaction; all this had a bearing as to the accuracy of the copy of the receipt produced by the defendant. But assuming the copy to have been accurate, the plaintiff's construction of it cannot be sustained. The package was directed to the Bank of Dalton; the undertaking was to forward it to that bank, who, by the direction upon the package, was made its consignee. The apparent object of the consignment was the redemption of the currency contained in it; redeeming it or seeing to its redemption was a trust confided to the consignee. My

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Opinion of the Commission, per HUNT, C.

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conclusion is that, by the contract, the defendant undertook to carry the package over its own line and to forward, or, in equivalent language, send it from the termination of its line, in the same condition it was received, by a connecting route; all of which was done by the safe delivery of the package to the Adams Express Company with proper directions. Upon this ground, as well as for the errors stated in rejecting evidence offered by the defendant, the order granting a new trial should be affirmed, and judgment absolute ordered in favor of the defendant, with costs to be adjusted.

HUNT, C. The written receipt of the company was given in evidence, by which the contract of carriage was established. The defendant then offered to read in evidence, an entry subsequently made by its clerk in the books of the company, as evidence of what the contract was. The judge properly excluded the evidence. Memoranda of facts, or circumstances, made by a witness at the time of the occurrence of a given transaction, are sometimes permitted to be given in evidence, to show the existence of such facts or circumstances. Thus in *Marclay v. Shultz* (29 N. Y., 346), the offer was to read a memorandum of the width of the flush boards on a certain dam, which was a specific fact, material to the issue. In *Guy v. Mead* (22 id., 462), the offer was to show that, at a given time, a certain indorsement of forty dollars was not on the note, that being a material fact for the consideration of the jury. In *Barker v. N. Y. C. R. R.* (24 id., 599), a conductor was allowed to read an entry, made by him, of the arrival of the train at Syracuse, at a time named. (See 1 Grenl. Ev., § 436, etc.) It is quite likely that this entry was competent to be read, to show that a parcel had then been received, if that fact had been in doubt, or to show the date of the transaction, or the like. This was not the purpose for which it was offered. "The defendants' counsel claimed that

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Opinion of the Commission, per HUNT, C.

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in the absence of the original receipt (a copy having been produced) it could be some evidence in regard to it." This means, that the subsequent entry by a clerk should be received as evidence to show that the real contract was different from the written one produced before the court. If the entry sustained the written contract, as proven by the plaintiff, it was quite unnecessary. The defendant was not called upon thus to strengthen its opponent's case. The preliminaries of loss and comparison having been proved, the copy was legally of as high an order of proof as would have been the original. The entry could only be important, as evidence, to weaken or to alter the written contract already established. No case can be found, I imagine, nor any dictum, which would authorize its admission for that purpose.

The principal question arises upon the construction of the contract. The defendant, being of the class of common carriers known as an express company, undertook with the plaintiff to "forward to Dalton, Georgia, for redemption," a package of currency, amounting to \$900, and it is to be liable "as forwarders only." The company, it is said, had no means of its own to transport this money farther than the city of New York. This fact, however, was not made known to the plaintiff. On the contrary, it expressly assumed, in its contract with him, the same obligation upon the contract from New York, southerly, as from Chicago to New York. It does not say to the plaintiff that I will carry your package to New York, and from thence I will forward it by some responsible company to Dalton. It assumes the same obligation throughout the whole distance, to wit, "to forward to Dalton." The receipt on the margin expressed the same idea. "The United States Express Company will forward bank notes, gold, \* \* \* and collect notes and accounts, daily, between New York \* \* \* Philadelphia \* \* \* Cincinnati \* \* \* and other principal cities of the west and south-west." No distinction is made between its duty in carrying to New York and other cities of the south and west. It "will forward" to each place. It is conceded by the

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Opinion of the Commission, per HUNT, C.

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defendant's counsel that its liability to New York is that of a carrier, and that it is sufficiently expressed by the engagement to "forward" the package, and that it is not qualified by the expression that it is to be liable as forwarder only. There is no propriety in giving to this word two different meanings. It is the general rule that a word, when repeated in the same sentence or the same connection, is to bear the same signification. It would certainly be a violent assumption to impute different meanings at the same time to a word when used but once in a sentence. When the defendant undertakes to forward this package from Chicago to Dalton, it is a single contract. This contract is denoted by a single word, and that is the same throughout the distance. Although it was, in fact, an extension of its liability beyond its own line, I am satisfied that the defendant, by the words made use of, undertook and assumed to carry and deliver this package to its destination in Georgia. (*Read v. Spaulding*, 5 Bosw., 395; *Place v. Union Ex. Co.*, 2 Hilt., 19; *Am. Ex. Co. v. Hain*, 21 Ind. R., 4; *Wareham Bank v. Burt*, 5 Allen, 113; *Weed v. Sch. & Sar. R. R.*, 19 Wend., 534; *Quimby v. Vanderbilt*, 17 N. Y. R., 306; *Webber v. G. W. Railway Co.*, 3 H. & C., 771.)

The defendant undertook to carry this package of money to Dalton for a special purpose; to wit, for the redemption of the same by the bank issuing it. This was a part of the recognized business of an express company. As conducted and arranged in the present day, the carrier does much more than the unintellectual routine acts to which the business was formerly confined. He is now the skillful, reflecting, confidential agent of the employer. A valuable case of jewelry is entrusted to the carrier for transportation, but only to be delivered upon one of two conditions; to wit, that the consignee pays the value thereof in cash, or that the carrier is satisfied that he is perfectly responsible for the amount. The carrier is entrusted with the collection of a note, payable at a distant point, and of which an important part of the value arises from its indorsement by a responsible man. The duty

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Opinion of the Commission, per HUNT, C.

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of the carrier is first to present the note to the maker or at the place indicated. If paid, the money is to be transmitted to the employer. If not paid, the further duty of protest and notice to the indorser devolve upon the carrier. These are now every-day contracts with express companies, are well understood, and are expressed by a single word. In the case before us the contract is of a similar character. The carrier is informed that the plaintiff has bank notes issued by a bank in Georgia, which he wishes to have presented for redemption. The carrier, for a compensation, is willing to undertake the duty. It is put in the form of a receipt, and this part of the contract is shown by the words "for redemption." Under the circumstances detailed, this amounts to an agreement to present this currency for redemption, to return the funds to the plaintiff, if redeemed, or to return him the notes, with the evidence of the refusal to pay in the event of non-payment. The bank is not a consignee. To deliver to a bank its own notes, and not require the equivalent, would be the reverse of a redemption. The essential idea of redemption of currency is that the party issuing it is a debtor, and is called upon to pay his debt by redeeming the notes presented. I think no two business men of fair understanding would disagree as to the meaning of this contract, and I doubt not that both the plaintiff and the defendant, at the time of making the contract, understood it to be as I have explained it.

Upon the whole case, I think the judge at the circuit was right, that the order for a new trial should be reversed, and that judgment should be entered for the plaintiff upon the verdict, with costs.

EARL, C., concurs with GRAY, C., upon question as to construction and effect of contract, but differs with him and concurs with HUNT, C., upon the question as to the competency, as evidence, of the entry upon defendant's books.

For affirmance, GRAY, EARL, LEONARD, CC.

For reversal, LOTT, Ch. C., HUNT, C.

Order affirmed, and judgment absolute against plaintiff, with costs.

JOHN H. MORE, Appellant, v. JAMES GORDON BENNETT,  
Respondent.

n construing a publication alleged to be libelous, the scope and object of the whole article is to be considered, and such a construction put upon its language as would naturally be given to it. The test is, whether in the mind of an intelligent man the terms of the article and the language used naturally import a criminal or disgraceful charge.

Extrinsic averments are not necessary where the words used, giving them their natural construction, tend to injure the reputation of the subject, and expose him to hatred, contempt or ridicule.

The complaint in this action charged, in substance, that defendant published an article wherein the writer, after stating that a certain woman was a prostitute, alleged that, as he understood, she was under the patronage or protection of the plaintiff. The complaint alleged that this charge was false and malicious, and tended to blacken and injure plaintiff's reputation, and expose him to public contempt. Plaintiff was nonsuited upon the ground that the complaint did not state a cause of action, as it contained no averment that the publication intended to charge that the prostitute was under plaintiff's protection for illicit purposes.

*Held*, error; that the intent to charge a criminal patronage or protection was manifest in the publication; the complaint was sufficient, therefore, without such averments.

(Argued January 4th, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, reversing an order of Special Term which set aside a nonsuit and granted a new trial, and dismissed the complaint with costs.

The action was for an alleged libel published in the New York Herald, contained in a letter addressed to the editor of that paper by Mrs. Kimball, widow of Lieut.-Col. Kimball, deceased.

The writer, after referring to certain matters relating to her deceased husband, says:

"Among the papers referred to as returned to me are my own private letters, scattered indiscriminately among the others, and returned to me after having been in the hands of a prostitute. And in her hands, too, are other household relics that are sacred to a wife. I find that I cannot obtain

## Statement of case.

them except through a long litigation by the public administrator. The police have called upon the woman, and she refused to give up anything belonging to my husband. She is, I understand, under the patronage or protection of a Mr. More, agent of the Central railroad, who has also employed the orderly of my late husband."

The plaintiff, in his complaint, alleged that he was a married man, and that the defendant is the editor and proprietor of the New York Herald, and that he (plaintiff) was referred to, intended, and designated as the Mr. More, and that he was thereby charged with having under his patronage or protection a public prostitute, and that the publication was malicious and false, and tended to blacken and injure his reputation, and expose him to public hatred, contempt, etc.

At the close of the evidence upon the trial, the defendant's counsel moved to dismiss the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action. This motion was granted and defendant excepted.

*William A. Coursen* for the appellant. The publication was without ambiguity and libelous upon its face. (Bouvier's, Dic., Libel, 5 Rep., 125; *Croop v. Tilney*, 3 Salk., 226; Per BAYLY, J., 8 B. and C., 33; *Clement v. Chirrs*, 9 B. and C., 172; *Churchill v. Hunt*, 2 B. and A., 685; *Brydell v. Jones*, 4 M. and W., 446; *Steele v. Southwick*, 9 J. R., 215; *Cooper v. Greeley*, 1 Denio, 347, 361, 362; *Snyder v. Andrews*, 6 Barb., 43; *Perkins v. Mitchell*, 31 Barb., 461.) The complaint was sufficient. (Code, §§ 142, 159, 164; 1. Chitty on Pleadings, 406, 407; *Wesley v. Bennett*, 5 Abb., 498; *Ensign v. Sherman*, 14 How., 439; *Hunt v. Bennett*, 19 N. Y., 173; *Dias v. Short*, 16 How., 322; *Bolton v. Hayward*, 8 Modem., 24; *Holt v. Sethfield*, 6 Term. R., 691.)

*Amasa J. Parker* for the respondent. The publication is not actionable *per se* (1 Kent. Com., 621, 630; *Harrison v. Stratton*, 4 Esp. Cas., 218.) Extrinsic averments were there-

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Opinion of the Commission, per HUNT, C.

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fore necessary. (*Cruger v. H. R. R. Co.*, 3 Kent, 201; *Bartholomew v. Bentley*, 15 Ohio, 670; *Harrison v. King*, 7 Taunt., 431; *Miller v. Buckdon*, 2 Brolstr., 10; *Pike v. Van Wormer*, 5 How., 171.) Words liable to two different interpretations must be construed in an innocent sense, unless the contrary is averred. (*Button v. Haymon*, 8 Modem., 24; *Holt v. Schofield*, 6 Tenn., 691; Townshend on Slander, § 142; *Robinson v. Jermyn*, 1 Price, 11; *Barnett v. Allen*, 3 H. & N. 376; *Hopkins v. Beedle*, 1 Cal., 347; *Vaughn v. Havens*, 8 John., 109; *Crookshank v. Gray*, 20 Johns., 344; *Bullock v. Keen*, 9 Cow., 30; *Ross v. Rouse*, 1 Wend., 475; *Joralemon v. Pomeroy*, 2 N. J., 271; *Gesling v. Morgan*, 32 Penn. St. R., 273; and other cases in note to section 142 of Townshend on Slander.) There is no question for a jury unless the injurious meaning is alleged in complaint and denied in answer. (*Mott v. Stoddard*, 38 Vt., 25.) Actions for libel are not to be encouraged; *Alsop v. Alsop*, 5 H. & N., 534; *Bennett v. Williamson*, 4 Sand., 67.)

HUNT, C. The plaintiff has received a scant measure of justice in the disposition of this case. The defendant was allowed to amend his answer by striking out those parts which admitted the publication of the libel, and substantially admitted it to be a libel. The plaintiff was refused permission to amend his complaint by adding a statement, the presence of which was held necessary to enable him to prove that the publication was libelous. For want of such a statement the plaintiff was thereupon nonsuited, and an allowance of \$500 was granted to his adversary upon a trial which, to judge from the report, could not have occupied more than two hours. The nonsuit was set aside at the Special Term, but was affirmed upon an appeal to the General Term of the first district.

The complaint charged the publication of a letter written by Mrs. Kimball, set forth at length, in which she charged, among other things, that letters of her deceased husband were returned to her, after having been in the hands of a



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Opinion of the Commission, per HUNT, C.

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prostitute; that in the hands of this prostitute were other relics sacred to a wife; that the police had called upon this woman and she refused to give up anything belonging to the writer. The letter added: "She (the prostitute) is, I understand, under the patronage or protection of a Mr. More, agent of the Central railroad." The plaintiff alleges that this charge respecting himself was false and malicious; that it tended to blacken and injure his reputation and expose him to public contempt. He was nonsuited on the ground that he did not allege that the publication intended to charge that the prostitute was under his protection for illicit purposes, and that therefore his complaint stated no cause of action.

In my judgment no man can read this statement without understanding it to contain a charge that this woman was the kept mistress of the plaintiff. To state that Anne Smith is a prostitute, and she is under the patronage or protection of Mr. More, is a charge that she is kept, protected or patronized for the purposes of prostitution. That a loose woman is under the patronage of a man named, is a technical statement that she is supported by him, for the purpose of sexual indulgence. When read in a book or newspaper, it would naturally have this only meaning. Add to this that the charge was false, made to blacken the character of More, and the statement is plainly within the law of libel. No one would understand this statement as meaning that the prostitute was an inmate of a reformatory institution, and that Mr. More was one of its supporters and thus protected and patronized her. Such a meaning to the words is possible, but it is most unnatural and forced. That any intelligent man would so understand the charge would exhibit a degree of charity and kindness of heart not often found in this censorious world.

In *Cooper v. Greeley*, (1 Denio, 358), the rule is thus laid down by JEWETT, J.: "It is the duty of the court in an action for a libel to understand the publication in the same manner that others would naturally do. The construction which it behooves a court of justice to put on a publication which is alleged to be libelous, is to be derived as well from the expres-

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Opinion of the Commission, per HUNT, C.

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sion used as from the whole scope and apparent object of the writer." To this rule he cites various authorities. I understand the principle to be there correctly laid down, to wit, the scope and object of the whole article is to be considered, and such construction put upon its language as would naturally be given to it. That case afforded a good illustration of the rule. Mr. Cooper had sued Mr. Greeley for a libel. The defendant in his newspaper, in commenting on the proceeding says: "There is one comfort to sustain us under this terrible dispensation. Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there." Another action was brought for the libel contained in the last sentence quoted, which it was alleged intended to charge that the plaintiff was in such bad repute in Otsego county that he would not like to bring a suit there. The question came up on demurrer, and the declaration was held good. The opinion to which I have referred is an elaborate one, reviewing all the cases upon the subject.

In the case of *Stone v. Cooper* (2 Denio, 293), an award had been made against another editor, who, in speaking of it, said, in his paper: "The money will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall street for shaving purposes before that period." On demurrer, this was held not to be libelous, on the ground that it fairly meant that the money was to be used in Wall street in buying, at a discount, existing securities, and that such purchase was neither illegal nor disreputable. Both cases were decided upon the principle that the language is to be construed fairly and naturally. It is not enough that a critic or a malignant may torture the expressions into a charge of a criminal or disgraceful act. Nor is it enough, on the other hand, that a possible and far-fetched construction may find an inoffensive meaning in the language. The test is whether, to the mind of an intelligent man, the tenor of the article and the language used naturally, import at criminal or disgraceful charge. In this case, the letter is cen-

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Opinion of the Commission, per HUNT, C.

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serious and fault-finding. Its object seems to have been to show the injuries the writer had received from those who had been near her late husband at the time of his death. In addition to what has been already stated, it alleged that money was contributed unnecessarily and misapplied; that the watch, the horse, and other articles of her husband had never been accounted for to her; that she was then trying to get even her little dog from the police; that her own private letters had been scattered among others indiscriminately, and returned to her after being in the hands of a prostitute; that in the hands of this prostitute are other relics sacred to a wife, which she can only obtain through a long litigation; that the police have called upon this woman, who refuses to give up to her anything belonging to her husband; and that she (this woman, this prostitute, who has done these things) is understood to be under the patronage or protection of a Mr. More, of the Central railroad, who has also employed the orderly of her late husband. The suggestion that this language does not, of itself, impute a charge that Mr. More keeps this prostitute as his mistress, because she may be under his protection as a member of some reformatory institution managed by him, is extravagantly far-fetched, and is hostile to the whole tenor of the communication. The charge that she is under the patronage of Mr. More is the culmination of the accusations preceding, and was plainly intended to charge a criminal patronage or protection. Every man or woman who read it must have understood such to be its meaning.

Words which are, of themselves, actionable; which, in their natural construction, tend to injure the memory of the dead, or the reputation of one alive, and expose him to hatred, contempt or ridicule, need no averment that they were intended to impute such offence. It is only where the words do not, of themselves, fairly charge the offence, that extrinsic averments are necessary. (*Cooper v. Greeley*, 1 Denio, 361; *Cronwell v.*

## Statement of case.

*Weed*, 25 Wend., 621.) In my opinion, the complaint was sufficient, and the cause of action was fairly made out. I am for reversal and new trial.

All concur, LEONARD, C., not sitting.

Judgment reversed.

LEMAN B. HOTCHKISS, Respondent, v. CHARLES MOSHER, impleaded, etc., Appellant.

A certificate of deposit issued by a bank is not a contract but an evidence of debt; it is in the nature of a receipt, and parol evidence is admissible to explain it, the same as in case of a receipt.

Plaintiff paid to defendants, who were bankers, the amount of certain notes held by them, which were guaranteed by him, for the purpose of taking up the same; the notes, being made payable at defendants' bank, were left with them for collection. As a voucher of the transaction, defendants delivered to plaintiff a certificate of deposit for the amount paid for the notes. In an action of trover for the conversion of the notes,—*Held*, that the referee was justified in finding that the certificate was a voucher that plaintiff had paid the money for the notes, thus giving it the character and effect ascribed to it by defendants. He was also justified in refusing to find that the money paid was a deposit.

When the facts which constitute a transaction are stated in detail in a referee's report, his finding as to their effect is a conclusion of law. Plaintiff, as a witness for himself, was asked to state what notes he had guaranteed. He answered from a written memorandum furnished him by defendants. *Held*, that the question was proper, as it simply called for a description merely, not the contents of the notes, and that the memorandum, as an admission of defendants, was proper evidence.

In an action of trover for the conversion of a written obligation, the defendant is supposed to have it in his possession or under his control, and no notice to produce it upon the trial is necessary to enable plaintiff to give parol evidence as to its contents; the action itself is notice.

M., one of the defendants, as a witness for them, was asked to state whether, if the notes had been left for collection, they would have been placed to collection account; also, whether, if the money had been paid to the bank for the notes, he would have given a certificate of deposit. *Held*, that the question was purely hypothetical, and the evidence was properly excluded.

(Argued January 5, 1872; decided May term, 1872.)

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Statement of case.

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APPEAL from judgment of the General Term of the Supreme Court in the seventh judicial district, affirming a judgment in favor of the plaintiff entered on the report of a referee.

The action is to recover for the conversion of five promissory notes, amounting to about \$800.

The referee found that on the 5th of September, 1857, the defendant held eleven promissory notes, amounting together to \$2,324.64, the collection of which was guaranteed by the plaintiff and discounted by the defendants, the said five notes mentioned in the complaint being a part thereof; that the plaintiff was a depositor with the defendants, and on that day his account as a depositor was stated by the defendants, and a balance of \$1,104.53 was found due to the plaintiff on that account, for which the defendants delivered him their certificate that he had deposited that amount with them, and that it bore interest at seven per cent per annum. The amount due on the said notes was also then reckoned up and stated. That on the same day the defendants requested the plaintiff to obtain the money and take up the said notes guaranteed by him, none of which were then due, except one for \$70.86 falling due that day, which was to be deducted; and the defendants agreed to pay to the plaintiff, for obtaining the money, the sum of ten dollars. That the plaintiff procured \$1,100 in cash, a check of fifty dollars, and a certificate of deposit with the defendants for fifteen dollars, and paid the same to the defendants to take up and purchase the said notes and extinguish his liability as guarantor thereof, and received from the defendants a *paper vouching* that he had paid them for said notes. That the notes were not actually delivered to the plaintiff, and, without having been in his actual possession after such payment, were left with the defendants for collection as they fell due, the said notes being made payable at the defendants' bank. That the defendants failed about the 12th, and made a general assignment for the benefit of their creditors about the 22d of September, 1857.

That the defendant Cole, on the 12th September, 1857,

## Statement of case.

delivered five of the said eleven notes to the plaintiff; but the remaining five notes mentioned in the complaint, the defendant Mosher, on the 9th of September, 1857, transferred to the Bank of Lima, as security for a note of the defendants discounted at that bank and afterward surrendered to them. That the certificate and voucher were never surrendered by the plaintiff to the defendants, but the plaintiff once offered to leave it with Mosher but he declined to receive it.

The referee found, as conclusions of law, that the plaintiff paid to the defendant the full amount of the ten notes guaranteed by him as the purchase price of the said notes which were sold to him by the defendants; that there had been a demand and refusal of the notes; and that the plaintiff have judgment for \$895. The counsel for the defendant Mosher excepted to each of the said conclusions of law. He also requested the referee to find "that at the time the plaintiff made the deposit, on or about the 5th of September, 1857, he took from the defendants a certificate of deposit in the usual form for the amount so left or deposited, payable on demand, with interest at seven per cent," but the referee refused so to find or decide otherwise than is in his report stated; the counsel for the defendants duly excepted to such refusal. It appeared from the evidence that when plaintiff paid the money for the notes, the defendant Mosher suggested to him that he had better take a "voucher;" that Mosher then made out and delivered a certificate that the plaintiff had deposited with them \$1,100, the sum then paid to the defendants. There was no provision in the certificate for the payment of interest. Judgment was entered for the plaintiff upon the report of the referee.

*E. Lapham* for the appellant. A party cannot by parol contradict or vary a written contract. (*Ely v. Kilbourne*, 5 Den., 514; *Dargen v. Ireland*, 14 N. Y., 322.)

*H. O. Chesebro*, for the respondent.

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Opinion of the Commission, per LEONARD, C.

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LEONARD, C. It appears from the evidence that there was an agreement on the 5th of September, 1857, to take up certain notes held by the defendants, the collection of which had been guaranteed by the plaintiff. The interest was computed, and the amount due on that day ascertained and settled by the parties. On the same day the amount due by the defendants to the plaintiff for deposits was also stated, and the plaintiff then procured and paid to the defendants the sum required, in addition to what the defendants owed him, to pay for the notes so purchased. The agreement was then understood to be consummated, and the title to the notes to be vested in the plaintiff, but, for his accommodation, they remained at the banking-house of the defendants, where they were all of them payable, so that they might be conveniently found by the makers at maturity. Nothing appears to disturb the conclusiveness of the arrangement, except the certificate that the money paid by the plaintiff had been *deposited* by him with the defendants. It is claimed that the taking of the certificate as for money deposited is not consistent with a title to the notes. The proper voucher would have been a receipt for the notes, the subject for which the plaintiff alleges that he paid his money. The inference from the delivery and receipt of the certificate is met by the plaintiff by the agreement that he should take up the notes, and its performance on his part, and by the fact that the defendants did deliver to him the larger part of the notes in amount, at a subsequent date, as in part performance of the agreement; and it is further claimed that the force of the certificate, as evidence inconsistent with his title to the notes, is overcome by the designation of it by the defendant Mosher as a voucher. The exception of the defendant to the refusal of the referee to find that the plaintiff, at the time of the deposit, took from the defendants a certificate of deposit for the amount, is based upon the evidence of conversion accompanying the delivery of this instrument. The referee has found, instead of the fact so requested to be found, that the plaintiff received from the defendants a "paper vouching that he had paid them for said

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Opinion of the Commission, per LEONARD, C.

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notes." It is apparent that the referee is correct in his finding of fact, as well as in his refusal to find as requested, unless the rules of law required him to accept the written certificate as conclusive evidence of the nature of the transaction, and to disregard the accompanying declaration of the defendant Mosher that the plaintiff should receive it as a voucher.

The certificate was simply an acknowledgment of so much money deposited with the bank. It was of the same force and effect as a receipt for money. The word "certify" adds no additional force to the instrument, as purporting a contract. It contained no promise on the part of the defendants; and if it had, the portion which operated as a receipt for money was quite as capable of separation from that part which evidenced a contract as in the case of a bill of lading. A certificate or acknowledgment that another has deposited a sum of money, has the effect of an acknowledgment by one party that he has received a sum of money from another. A simple certificate like the one in question is not the basis of an action like a promise in writing, but would be evidence, like a receipt, to raise an implied promise to pay in an action for money had and received. We are of the opinion that parol evidence was admissible to explain the certificate in the same manner as in the case of a receipt. (1 Greenl. Ev., § 305.)

In this case the defendants proposed it as a voucher, and themselves prepared and delivered it as such, and the plaintiff so accepted it. It may be well held that the defendants are thereby estopped from claiming for it any other character or effect. The referee, regarding it as a voucher for the money to be received on the collection of the notes, has found that the certificate is "a paper vouching that the plaintiff had paid the defendants for the notes," thereby adopting the effect given to it by the defendant Mosher, when he prepared and delivered it to the plaintiff. He was justified on that ground for refusing to find, as requested, that the money paid by the plaintiff was a deposit, or in any manner affording an inference that the money was received by the defendants for any



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Opinion of the Commission, per LEONARD, C.

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purpose except in payment for the notes thereby purchased and paid for.

These considerations also dispose of the objection that the conclusion of the referee that the money was paid as the purchase-price of the notes, is one of fact and not of law. The referee set forth the facts of the transaction, and declared that those facts constituted in law a payment of the purchase-price for the notes. In the manner that the report is drawn, the conclusion of payment is one of law. When the facts are stated in detail which constitute the transaction, their effect is a conclusion of law, and in the present case it is correctly designated as a payment of the price of the notes.

The defendants have made some criticism in respect to the omission to produce the certificates of deposit at the trial, but the question was not there raised so as to bring it before this court, or require any consideration. The defendants have urged three exceptions taken at the trial to the admission or exclusion of evidence:

1st. The plaintiff, as a witness in his own behalf, was asked, on cross-examination, "What did you receive for guaranteeing the paper?" An objection by the plaintiff's counsel was sustained, and the defendants excepted. The paper referred to was the notes guaranteed by the plaintiff, and the subject of the action. It is impossible to perceive that this inquiry has any pertinency. It was suggested by counsel that it corroborated the defendants' evidence that the plaintiff was allowed interest on his deposits, and that he was to keep on deposit an amount equal to his guaranteed paper, as to which latter fact there was a discrepancy in the proof. It still remains not apparent how the question of a commission for guaranteeing, or the amount of such commission, would aid or corroborate the defendants. Besides, there was no difference in the evidence on the point so disputed at the time when the question was put, and it was not repeated after the difference arose on the evidence given by defendant Mosher.

2d. The plaintiff was asked, as a witness in his own behalf,

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Opinion of the Commission, per EARL, C.

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to state what notes he had guaranteed. The defendants objected on the ground that the notes could not be proved by parol. The objection was overruled, and the defendants excepted. The inquiry did not relate to the contents of the notes. It called for a description. The witness gave it from a written memorandum, which had been made and furnished to him by the defendant Mosher, when it was proposed that he should purchase or take up his guaranteed paper. The memorandum of the defendants was an admission by them, and, as such, evidence for the purpose for which it was introduced. The rule that the best evidence only must be admitted, was not transgressed.

3d. The defendant Mosher, as a witness in his own behalf, was asked to state whether, if these notes had been left for collection, they would have been placed to collection account, in a book kept by the defendants in which they entered all notes left for that purpose. On objection by the plaintiff, the inquiry was excluded, and the defendants excepted.

The defendants had previously proven that they kept such a book, and that these notes were not entered in it. The inquiry objected to was purely hypothetical. The defendants must be content with the deduction justly to be drawn from the fact they were not entered, and any other actual fact which existed, upon which a reasonable inference should be predicated. There was another question of a similar character to which an objection by the plaintiff and exception to the ruling occurred in the like manner as the last. The defendant was asked, in his own behalf, as follows, viz.: "If this \$1,100 had been paid to the bank for these notes, would you have given a certificate of deposit?"

The same reasons which sustained the ruling of the referee, in excluding the previous hypothetical inquiry, are applicable to this. There was no error, and the judgment should be affirmed with costs.

EARL, C. Upon the trial of this action, the plaintiff was sworn as a witness, and after testifying that he had guaranteed

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Opinion of the Commission, per EARL, C.

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a number of notes, was asked the following question : State what notes you have guaranteed ? To this question defendants' counsel objected, on the ground that the notes could not be proved by parol. The court overruled the objection, and the witness was permitted to answer. The ruling violated no rule of evidence. The question was merely preliminary, and the witness could properly describe by parol the notes which he had guaranteed. Even if it was necessary for the plaintiff, to sustain a recovery for the five notes, either to produce them or to prove their contents by secondary evidence after laying the proper foundation, this objection to this question, at this stage of the trial, did not raise the question, and it was not raised, in any form, at any other stage. The parties seem to have assumed that the character and value of the five notes were sufficiently and properly proved to sustain the action, and the only question litigated was whether the defendants had sold the notes to the plaintiff, and vested him with the title to them, so that he could maintain an action for the conversion of them. But the question was not improper in any aspect of the case. In an action of trover to recover for the conversion of written obligations, the defendant is supposed to have them, in his possession or under his control, and the action itself is notice to him to be prepared to produce them upon the trial, or to be ready to prove their contents. (*How v. Hall*, 14 East., 274 ; *People v. Holbrook*, 13 Johns., 91 ; *Bissel v. Drake*, 19 id., 67.)

The defendant Mosher was sworn as a witness on his own behalf, and testified that the defendants kept in their bank a book in which were entered all notes left with them for collection, and he was then asked the following question : " Will you state whether, if these notes had been left for collection, they would have been placed to that account ? " To this question plaintiff's counsel objected, and the court sustained the objection, and this is claimed as error. I am of the opinion that this claim is not well founded. The witness was permitted to testify that the bank kept such a book ; that all notes left for collection were entered in it, and that these notes were

Opinion of the Commission, per EARL, C.

*Samuel Hand* for the appellant. To sustain this action, apparent validity and total invalidity, in fact, must be shown. If lien is to any extent valid, it is no cloud. (*Heywood v. City of Buffalo*, 14 N. Y., 542.) Assessing in name of previous owner in absence of notice of change of ownership is a substantial compliance with the law, and sufficient. (*Morange v. Mix*, 44 N. Y., 315.) Plaintiff should show defendant was seeking to obtain a conveyance. (*Scott v. Onderdonk*, 14 N. Y., 16.) The general rule requiring land to be assessed for taxes in the name of the owner or occupant does not apply to assessments. (*Sharp v. Spier*, 4 Hill., 82; *Matter of Mayor of N. Y.*, 11 J., 77.)

*D. P. Barnard* for the respondent. An assessment for local improvements must be made in the name of the owner or occupant; if not, a sale under it is void. (*Chapman v. City of Brooklyn*, 40 N. Y., 372; *Crooke v. Andrews*, 40 id., 547.)

EARL, C. The main question to be considered in this case is, whether the assessment was legal, inasmuch as it was made against Terrett, and not the plaintiff who was the owner, and the solution of this question depends upon the construction of various provisions of the "Act to consolidate the cities of Brooklyn and Williamsburgh and the town of Bushwick, into one municipal government, and to incorporate the same," passed in 1854. (Chapter 384, Laws of 1854.)

By section thirteen of title two of the act, the common council is authorized to cause sidewalks to be flagged; but before any ordinance can be passed for that purpose, ten days' notice of the application for or the intention to pass such ordinance is required to be given to every person to be affected thereby, either personally or by publication in the corporation newspapers.

All assessments for improvements in the city, including flagging sidewalks, are made a lien upon the property assessed, and the expense of the improvements is directed to be assessed

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Opinion of the Commission, per EARL, C.

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by the assessors on the several lots or parcels of land benefited in proportion to benefits received. (Title 4, §§ 21, 22, 23.) And by section thirty it is provided that "land occupied by a person other than the owner may be assessed in the name of the occupant," clearly implying that, when land is occupied by the owner, it must be assessed to him.

A form of warrant to collect the assessments is provided for in section eleven, title five, which directs that the warrant shall require the collector "to collect, from the several persons named in the assessment roll annexed thereto, the several sums mentioned in the last column of such roll opposite to their respective names." Section fifteen provides that if any assessments remain unpaid at the expiration of one hundred and twenty days, and the collector shall not be able to collect the same, he shall deliver to the comptroller of the city an account of the assessments so remaining due, with an affidavit; and section twenty-three provides that the affidavit shall state, among other things, that the sums mentioned in the account remain unpaid, and that he has not upon diligent inquiry been able to discover any goods or chattels belonging to or in the possession of the persons charged with or liable to pay such sum whereon he could levy the same, and that he caused a written or printed notice to be served personally on or left at the place of residence of the person charged with or liable to pay the assessment, if a resident of the city, or, if not a resident of the city, that he has deposited a notice in the post-office addressed to the persons assessed; and that he has also caused a notice to be published in the corporation newspapers, which notice, among other things, shall contain the names of the persons who have not paid, and the amount due from each; and section 24, requires a further notice to be published, which shall specify, among other things, the name of the person to whom the assessment was made, and the name of the present owner, when known to the collector. Section 26 provides that if the assessment shall remain unpaid on the day specified in the last notice, then the collector shall proceed to sell the property on which the assessment shall have been imposed.

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Opinion of the Commission, per EARL, C.

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These are the principal provisions of the act to which it is important to call attention in order to solve the question under consideration. It will be seen that the assessments are made liens upon the real estate upon which they are imposed, and that they are also made claims against the owners of the real estate, as the collectors are directed, in the warrants given to them, to collect the assessments from them. The lien upon the real estate can only be enforced by a sale thereof, after it has been shown that the collector has not, upon diligent inquiry, been able to discover any goods or chattels whereon he could levy the assessment. It is clear that an assessment roll must be made, in which the name of the owner must be inserted as the person liable to pay the assessment, unless the land be occupied by another, in which case it may be assessed to the occupant. No assessment can be legal or valid, unless it be made against the owner or occupant, and such owner or occupant is the person named in the statute as liable to pay the assessment, to whom all notices are to be directed; and the land can be sold only after the proper steps have been taken to collect the assessment of the owner or occupant, by voluntary payment, or by levy upon personal property.

The assessment, therefore, was illegal and invalid, because it was made against Terrett, and not the plaintiff, who had, for about two years, owned the land, and had her title upon record. This conclusion is reached by giving to the provisions of the statute their plain and obvious meaning, and is strengthened by the well-known rule that when lands are taken under a statute authority, in derogation of the common law, every requirement of the statute, having a semblance of benefit to the owner, must be strictly complied with. (*Sharp*, v. *Speir*, 4 Hill, 76; *Sharp* v. *Johnson*, 4 id., 92.)

The case of *Chapman v. City of Brooklyn* (40 N. Y., 372) is an authority sustaining the conclusion I have reached. It is true that the assessment in that case was made under the law of 1850. (Laws of 1850, chapter 144.) But that law, like the law of 1854, made the assessment a lien upon the land assessed, but provided for its collection, first, against the

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Opinion of the Commission, per EARL, C.

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person liable to pay; and the land could not be sold until the other proceedings authorized to collect the assessment of the person assessed had failed to produce payment, and the assessment and sale in that case were held void, because the assessment was not made against the owner of the lots sold.

By section ten, title five, of the act of 1854, it is provided that no warrant for the collection of any assessment shall be issued by the common council, until all the proceedings had in levying the assessment shall have been examined and certified as correct by the street commissioner and the attorney and counsel of the city, which certificate shall be entered upon or annexed to the assessment roll, and shall be conclusive evidence as to the regularity of the proceedings. The defendant claims, therefore, that the regularity of the proceedings could not be brought in question in this action, and that the question above discussed cannot be raised to invalidate the sale.

The law of 1850, which was under consideration in the case of *Chapman v. City of Brooklyn*, had precisely such a provision in section ten, title five, of that act, and yet the certificate was not held conclusive in that case. The certificate does not reach the defect here complained of. It was only intended to cover the formal proceedings. The officers named were to examine to see if all the necessary steps had been taken, and whether the proper records and other formal proceedings were regular. But I do not think, according to the spirit and letter of the law, they were expected to go back of all the papers and records and ascertain whether the persons named as owners in the assessments were in fact the owners. Hence I am of opinion that the certificate was not conclusive as to the defect here complained of.

I entertain no doubt that this action upon the facts appearing is maintainable to cancel and annul the certificate of sale as a cloud upon plaintiff's title to her land. (*Crooke v. Andrews*, 40 N. Y., 547.) It does not appear upon the face of these proceedings that the assessment and sale were void. To avoid the sale, it might be necessary for plaintiff

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Statement of case.

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to show, by evidence, not contained in the assessment proceedings, that Terrett, against whom the assessment was made, was not at the time either the owner or the occupant of the land ; and hence this is, within the well established rule, a case where a court of equity will intervene to remove or set aside the sale and certificate as a cloud upon title.

There was no error, as to costs, which calls for or authorizes an interference. If the defendant claimed nothing by virtue of his certificate, he should not have defended the action and subjected the plaintiff to costs. Having litigated the case through all the courts to the Court of Appeals, he cannot well complain if the court, in the exercise of its undisputed discretion, imposes the costs upon him.

I have thus considered all the grounds upon which the defendant has asked us to reverse this judgment which I deem important, and reach the conclusion that it must be affirmed, with costs.

All concur ; LOTT, Ch. C., not sitting.

Judgment affirmed.

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THE SALT SPRINGS NATIONAL BANK, Respondent, v. JOHN R.  
WHEELER, Appellant.

A demand and refusal to deliver do not establish a conversion, where, at the time of the demand, the property in question is not in existence. The accidental loss or destruction of an article by one lawfully in its possession, is not a conversion.

(Submitted January 5, 1872 ; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial district, affirming a judgment in favor of the plaintiff, entered upon the decision of the court at circuit, upon trial without a jury.

The complaint alleges the wrongful conversion of three drafts or bills of exchange drawn by Jaycox & Green upon



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Statement of case.

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the defendant, each payable one month after date to their own order, and indorsed by them, and dated, respectively, September 16, November 6 and November 22, 1865, amounting together to \$1,012, which were delivered by Jaycox & Green to the plaintiff, discounted by the bank, and sent to the defendant for acceptance and payment, and to be returned if not accepted. A demand and refusal were also averred.

At the trial it was proven, on the part of the plaintiff, that the bills were drawn at the different dates, as alleged, and delivered to the bank for collection; that they were drawn for goods sold to the defendant; that they were discounted for the drawers by the bank soon after they were so received, and sent to the defendant for acceptance and payment. That the plaintiff sent an agent to the defendant at the village of Farmer, where he resided, who, by their authority, demanded the said bills of him. The defendant, in answer to the demand, claimed, at first, as testified by the agent, that he had returned the bills, but, afterward, made an unsuccessful search for them, and finally said that they might have been burned up among some papers of no value.

The defendant testified, in his own behalf, that when the demand was made he went to another room and searched for the bills, but was unable to find them; that he did not say that he had burned them, but said that they might have got into his waste-basket and thus have been lost or destroyed; that he had since looked for but could not find them; that he had never destroyed or negotiated the bills, and that he was insolvent.

The judge found, among other things, that the plaintiff demanded the bills of the defendant, who refused to deliver them; said bills having been lost, mislaid or destroyed through the negligence of the defendant, and converted the same; and, as a conclusion of law, that the plaintiff was entitled to recover the amount of the bills, with interest from the demand, amounting together to \$1,071.

The defendant duly excepted.

## Opinion of the Commission, per HUNT, C.

*W. B. Smith* for the appellant. If the drafts were not in existence when the demand was made, then a refusal does not amount to conversion. (*Packard v. Getman*, 4 Wend., 612, *Hawkins v. Hoffman*, 6 Hill, 586; *Whitney v. Slawson*, 30 Barb., 276; 32 id., 396; *Bowman v. Eaton*, 24 id., 528; *Kelsey v. Griswold*, 6 id., 436; 1 Wait's L. & P., § 24; Ad. on Torts, 3d ed., 311.)

*Hunt & Green* for the respondent. The bills were valid, and any person destroying them or refusing to deliver on demand would be liable for their value. (1 Cowen, 240; 2 Hill, 550; 1 Sand., 96; 4 id., 248; 10 John. R., 172; 3 John., 432; 12 id., 484; 19 id., 66; 3 Camp. R., 476; Sedgwick on Damages, 3d ed., 514, and cases cited; *Decker v. Mathews*, 2 Kernan, 12 N. Y. R., 313.)

HUNT, C. The advantage of an action in trover, rather than an action in assumpsit, in the collection of a debt, is apparent. It gives a right to hold to bail during the pendency of the action, and a right of imprisonment upon an execution, in addition to the usual resort to the property of the defendant. To procure this advantage the plaintiffs have passed by their plain and obvious remedy, of an action against the defendant for a breach of contract, and have brought an action of trover. The question is whether they can sustain it.

During the autumn of 1865, the defendant being indebted to the firm of Jaycox & Green in the sum of \$1,012.18, that firm drew upon him for the amount in three several bills of exchange at one month each. These bills were discounted by the plaintiff at about the time of their several dates, and had all matured before the 30th day of December. On that day one of them had been due two and a half months, the second nearly two months, the last a few days. These drafts were severally transmitted by the plaintiff to the defendant for acceptance and payment, he being engaged in the business of a banker also. Before the 30th of December the defendant failed and made an assignment. On that day the plaintiff's agent

## Opinion of the Commission, per HUNT, C.

demand of him the drafts in question. He replied that he thought he had returned them to the plaintiff. Upon reflection and examination he stated that he could not find them, and that he might have burned them up in destroying other papers that he considered of no value. It was not pretended by any witness that the defendant asserted any title to the bills or claimed any right to hold or retain them. There was no reason to doubt the accuracy of the defendant's statement. The judge finds that they were lost, mislaid or destroyed through the negligence of the defendant. He also finds that he "converted the same."

To authorize the action of trover, two things are necessary : 1. Property in the plaintiff with a right of possession ; and 2. A conversion by the defendant of the thing to his own use. This conversion consists of the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in defiance of the plaintiff's right, or in withholding it under a claim of title. (1 Greenl. Ev., § 642, and cases cited.) The destruction referred to as constituting a conversion is an intentional destruction, not an accidental act. Thus, a misdelivery of goods by a bailee is a conversion. (*Id.*, and *Deming v. Barclay*, 2 B. & A., 702 ; *Seyd v. Hay*, 4 T. R., 260.) But the accidental loss by the carrier is not. (*Ross v. Johns*, 5 Burr, 2825 ; *Dwight v. Benton*, 1 Pick., 50.) A *wrongful* sale is a conversion, but a purchase in good faith is not in the first instance a conversion. (*Id.*, § 642.) The accidental loss or destruction of an article by one lawfully in its possession has never been held to be a conversion. (*Bromley v. Coxwell*, 2 B. & P., 438 ; *Cairns v. Bleecker*, 12 J. R., 300 ; *Jervis v. Jolliffe*, 6 *id.*, 9.)

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In *Laplace v. Aupper* (1 John. Cas., 407), cited to the contrary, it appeared that the goods had been placed in the defendant's possession, and had been sold by him, contrary to the orders of the owner. Their subsequent loss on the voyage on which they were shipped was held to make no difference. The defendant was guilty of a direct act of conversion and the action was well brought.

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Opinion of the Commission, per HUNT, C.

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On the question whether trover will lie to recover bills of exchange situated like these, two cases have been cited, viz.: *Treuttel v. Barandon*, 8 Taunton (4 E. C. L. R., 33), and *Evans v. Kymer* (1 Bar. & Ad., 528). Neither of these cases resembles the one before us in its essential elements. In *Treuttel v. Baranden*, the plaintiffs were the owners of the several bills of exchange, drawn respectively by Gorton and G. Crosswich upon Spears, indorsed: "Pay to I. P. De Rouse, Esq., or order, for account of Messrs. Truttel & Wentz." These bills were placed or left by the plaintiffs in the hands of De Rouse as their agent, to be used for the plaintiffs, and, as directed by them. De Rouse negotiated them as security for his private loan. The plaintiffs demanded the bills, and, upon refusal, brought trover for their recovery. The defendants claimed to have obtained the bills by purchase from De Rouse, and insisted upon the validity of their title. The court held that the form of the indorsement gave sufficient notice that the bills were the property of the plaintiffs, and gave judgment for their value. The case varies from the one before us, in the important particulars that the bills were still in existence, and that the defendants obtained possession of them without just right, and insisted upon their ownership.

In the case of *Evans v. Kymer*, the bill was drawn by Nevett upon the plaintiff, accepted by him, and retained by Nevett in his possession for the convenience of the plaintiff, and to be used as by him directed. Nevett negotiated the bill to the defendant for value, but with knowledge of all the facts. The defendant claimed the right to hold the bill. Trover was brought for the bill, and the chief defense was that the plaintiff himself never had sufficient property in the bill to maintain trover. The action was maintained; Lord TENTERDEN closing his opinion with this remark: "The jury here were directed to find the value of the bill, in case they found their verdict for the plaintiff. If the defendant deliver up the bill, nominal damages may be entered on the record." This case is authority that the plaintiff here had sufficient property in the bills to sustain the action, which, indeed,

upon the facts as found, is too clear to need any authority. It establishes nothing else pertinent to the case before us. Demand and refusal do not establish a conversion to the defendant's own use, where, as in this case, it appears that at the time of the demand, the bills were not in existence. They had been previously and accidentally destroyed. The failure to deliver that which is not in being and cannot be delivered, furnishes no evidence of an appropriation by the defendant. *Murray v. Burling* (10 John. R., 172), and *Decker v. Mathews* (12 N. Y., 313), are cases where the party sued had wrongfully transferred the bill, and received and applied the proceeds to his own use. They furnish no authority upon the case before us, which is one of an accidental loss or destruction of the bill, no money being received upon it. Upon all of the authorities I have been able to consult, my judgment is that there was no evidence of any conversion of these bills. There was never any denial of the plaintiff's property; there was no claim of property in the defendant; there is no evidence of a voluntary or intentional destruction of them.

I see no reason why the plaintiff should not be left to the remedies upon contract that are open to it. By the statute of this State (1 R. S. 769, § 11), "Every person, upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or refuse within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, shall be deemed to have accepted the same." This statutory provision is in affirmance of the common law, which holds that when a bill is left with a drawee for acceptance and retained by him beyond a reasonable time, the bill is to be deemed accepted. So if the bill be destroyed by the drawee while in his hands. (*Harvey v. Martin*, 1 Camp. R., 425; *Jeune v. Ward*, 1 Bar. & Ald., 657, 662; *Edwards on Bills*, 396; *Bayley on Bills*, ch. 6, § 1, p. 100.)

I see no reason again why the defendant is not liable, upon  
SICKELS—VOL. III. 63

## Statement of case.

his implied promise to present the bills for acceptance, to receive and transmit the money if paid, and in case of refusal to accept or of non-payment, to notify the plaintiff. The transmission to him and the receipt for this purpose render him liable for the breach of this duty.

I am of the opinion that the judgments should be reversed and new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

WILLIS S. NELSON, Respondent, v. THE HUDSON RIVER RAIL-  
ROAD COMPANY, Appellant.

An authority to deliver goods to a common carrier for transportation includes all the necessary and usual means of carrying it into effect. It can only be executed by obtaining the consent of the carrier to receive them, and the agent is therefore authorized to stipulate for the terms of transportation.

The consignor of goods to a distant consignee, who is the owner, is the agent of the consignee for the purposes of shipping.

The railroad act (chapter 140, Laws of 1850), fixes no tariff or rate of freight.

This is a subject of contract solely. The agreement to carry is a consideration for the agreement to pay the freight. The liability to pay freight is the consideration for the agreement to carry. The parties may fix such reasonable rates as they may agree upon, and they may make such limitations to the liability of the carrier as they think proper.

Plaintiff purchased of K., W. & Co. a mirror, directing them to deliver it to the defendant for transportation to Fulton, N. Y. K., W. & Co. sent it by a cartman to defendant's depot. The agent in charge refused to receive it unless the cartman would sign a contract releasing the company from liability for breakage, etc., unless caused by collision resulting from negligence of its servants, in consideration of its agreement to carry at tariff rates. The contract contained a clause that if objection was made to it the freight agent was to be notified before the property was shipped. K., W. & Co. knew of the custom of the company to require such a contract before receiving goods liable to extra hazards. The cartman signed as agent for shipper and owner. It was agreed that the mirror should be retained until the next day, and should be returned if K., W. & Co. requested. The cartman delivered a duplicate of the contract, and stated the facts to K., W. & Co. No dissent or request to return having been made by the latter, the mirror was forwarded and was broken *in transitu*. *Held*,

48	498
127	447
48	498
155	119
48	498
170	187

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Statement of case.

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that K., W. & Co. were authorized to make the contract on behalf of plaintiff, that they could depute the cartman to make it for them, that there was a complete ratification of his acts, and that the contract made by him was valid and binding upon plaintiff.

(Argued January 5, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial district, affirming a judgment in favor of plaintiff, entered upon a decision of the court at circuit upon trial without a jury.

This action was submitted to the court on the trial thereof upon a statement of facts containing the following:

Defendant was, at the time mentioned in the complaint, and for a long time previous thereto, accustomed to refuse to receive or carry, at its ordinary tariff rates, large mirrors and other articles too bulky to be carried in covered cars, and for that reason liable to extra hazards, unless the shippers would execute and deliver to them a release of liability in respect thereto, which custom was well known to Kimball, Whittemore & Co., and to Luke Greehey, but was not known to the plaintiff. Prior to the 14th day of February, 1863, the plaintiff purchased of Kimball, Whittemore & Co. a plate mirror and frame, for which he paid to them \$195, and, for boxing and shipping the same, five dollars, being in all \$200, which was at the time the value thereof, and directed that the same be well packed in a box, and delivered in good order to the Hudson River Railroad Company for transportation by railroad to Fulton, N. Y., but gave the said Kimball, Whittemore & Co. no other authority to contract with the carrier, or to execute the release, of which schedule "A" is a copy.

On the 14th day of February, 1863, the said property was delivered by Kimball, Whittemore & Co. to Luke Greehey, a cartman with directions to take the said goods to the depot of defendant, and there to ship the same, the said Kimball, Whittemore & Co. not knowing that the package was too bulky to be carried in a covered car.

Greehey carried the same to the depot, and there offered

## Statement of case.

the same for transportation to one Jerome Buel, an authorized receiving agent of the defendant. It was, in fact, too bulky to be carried in a covered car, and Buel refused to receive the same unless Greehey would first sign the release, a copy of which is hereto annexed marked "Exhibit A," whereupon Greehey signed the said release, and delivered the same to Buel, and Buel then received the said goods for transportation by the defendant, and signed and delivered to said Luke Greehey a receipt therefor.

A duplicate copy of Exhibit A was at the same time signed by Buel and Greehey, and taken by Greehey to give to Kimball, Whittemore & Co., and it was agreed that the box should be retained in defendant's depot till the next day, and should be returned to Kimball, Whittemore & Co., if they requested it. Greehey did give papers to Kimball, Whittemore & Co., and stated all the facts to them above set forth. Kimball, Whittemore & Co. did not before the next day request the return of said box, or communicate to the defendant any dissent from the arrangement.

The defendant, the next day, with ordinary care and diligence, transported the said goods to Troy, and, on the arrival at Troy, the mirror was found to be broken.

## EXHIBIT "A."

(COPY.)

HUDSON RIVER RAILROAD COMPANY, }  
TWELFTH ST. STATION, NEW YORK, *Feb.* 14, 1863. }

In consideration of the Hudson River Railroad Company, and also in consideration of any roads therewith connecting, receiving and carrying at tariff rates, the following property as now packed, viz.:

W. S. NELSON, }  
FULTON, N. Y. } One box, gilt mirror.

The same being admitted to be articles too bulky to be carried in covered cars, and by reason thereof liable to extra hazards, the owner and shipper hereby release each and all



## Statement of case.

said companies from any liabilities for damage, or loss of or to said articles by reason of breaking, chafing, fire or water, except such as may be caused by collision or running from the track, resulting from negligence of the company's agents. And the shipper and owner hereby promise to pay freight at such rate, and to claim no deduction therefrom by reason of such damage. Any objection to this contract is to be immediately notified to the proper freight agent of the station at which the property has been delivered, and before said property is shipped therefrom, that a new contract may be made if this contract is not satisfactory.

(Signed)

W. AFFLECK,

*Station Agent, per BURL.*

LUKE GREEHEY,

*Agent for Shipper and Owner.*

[Signed in duplicate.]

The court directed judgment for plaintiff for the full value of the mirror, with costs, and judgment was entered accordingly.

*Frank Loomis* for the appellant. The contract of Greehey bound K., W. & Co. (*Anderson v. Coonley*, 21 Wend., 273.) It was fully ratified by them. (*Gage v. Sherman*, 2 N. Y. R., 417; *Seymour v. Wyckoff*, 10 id., 213; *Nixon v. Palmer*, 8 id., 398.) A railroad company is not liable for goods until there has been a delivery to and acceptance by it. (*Grosvenor v. The N. Y. C. R. R. Co.*, 39 N. Y., 34.) K., W. & Co. were authorized to contract for plaintiff; their contract binds him. (*St. John v. Van Santvoord*, 6 Hill., 157; *Dunlap's Paley's Agency*, 8 Am. ed., chap. 3, part 1, § 5; *Jeffrey v. Bigelow*, 13 Wend., 518; *Anderson v. Coonley*, 21 id., 279; *Smith v. Empire Ins. Co.*, 25 Barb., 497; *Medbury v. N. Y. & E. R. R. Co.*, 28 id., 564; *N. Y. Life Ins. and Trust Co. v. Beebe*, 7 N. Y., 364; *Story on Agency*, § 160; *Sims v. Bond*, 5 Barn. & Adol., 393; *Higgins v. Senior*, 8 Mees. & Wels., 834, 844; *Beebe v. Robert*, 12

## Statement of case.

Wend., 413; *Taintor v. Prendergast*, 3 Hill., 72; *Van Lien v. Byrnes*, N. Y. Com. Pl., 1 Hilt., 133; *Meyer et al. v. Harnden's Ex. Co.*, N. Y. Com. Pl., 24 Howard, 290; *N. J. Steam Nav. Co. v. Merchants' Bank of Boston*, 6 Howard [Sup. U. S.], 344, NELSON, J., Opinion; *York Co. v. Central Railroad* [Supreme Court U. S.], 3 Wallace, 107.) The contract limiting defendant's liability is valid. (Pierce on Am. R. R. Law, 419, 420; Story on Bailm., § 549; Angell on the Law of Carriers, § 127; Redfield on Railways, 266, 273; *Parsons v. Monteath*, 13 Barb., 353; *Moore v. Evans*, 14 id., 524; *Wells v. N. Y. C. R. R. Co.*, 26 id., 641; *Dorr v. N. J. Steam Nav. Co.*, 1 Kernan, 485; *Mercantile Mutual Ins. Co. v. Calebs*, 20 N. Y., 173; *Same v. Chase*, 1 E. D. Smith, 115; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 Howard U. S. R., 344.)

*J. H. Townsend* for the respondent. Plaintiff, as consignee, was presumed to be owner. (*Sweet v. Barney*, 23 N. Y., 335.) Defendant's liability does not rest upon contract, but upon its duty as carrier. (*Merritt v. Earle*, 29 N. Y., 115, 122.) The person who delivers goods has not, necessarily, power to contract for transportation. (*Robinson v. Baker*, 5 Cush., 137; *Stevens v. B. & W. R. R. Co.*, 8 Gray, 262; *Fitch v. Newbury*, 1 Doug., 1; Redfield's note to *Schneider v. Evans*, 9 Am. Law Reg. [N. S.], 540.) The alleged release was without consideration, and therefore void. (*Nevins v. The Bay State Steamboat Co.*, 4 Bosw., 225; *Dorr v. The N. J. Steam Nav. Co.*, 1 Kernan, 485; *Squire v. The N. Y. C. R. R. Co.*, 98 Mass., 239, see pages 248 and 249; *Bissell v. N. Y. C. R. R. Co.*, 25 N. Y., 442.) Defendants failed to deliver and cannot avail themselves of the release. (2 R. S. [5 ed.], 693, § 97; Angell on Carriers, §§ 95-98, 287; *Foy v. Troy and Boston R. R. Co.*, 24 Barb., 382; *Smith v. The N. Y. C. R. R. Co.*, 43 id., 225; *Grant v. Johnson*, 1 Seld., 247; *Williams v. Holland, Jr.*, 22 How., 137; *Goold v. Chapin*, 20 N. Y., 259; *Pepper v. Haight*, 20 Barb., 429.) The alleged usage was invalid because personal and local, not

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Opinion of the Commission, per HUNT, C.

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general. (*Macy v. The Whaling Ins. Co.*, 9 Met., 354, see on page 365; *Wood v. Wood*, 1 Carrington-Payne, 59; *Stevens v. R.*, 9 Pick., 198.)

HUNT, C. It is admitted that the defendant was a common carrier at the time of receiving the looking-glass for transportation. It is conceded also, as a matter of law, that a common carrier may limit his liability by express contract. This has been held many times within a few years past (*Redfield on Carriers*, § 11 *et seq.*; *Dorr v. N. J. Steamboat Nav. Co.*, 11 N. Y., 486; *Bissell v. N. Y. C. R. R. Co.*, 25 id., 442.)

An agreement, special and limited in its character, was actually made in this instance, and under which the defendant claims exemption from liability. The plaintiff insists that he gave no authority for the making of that contract, and that he is not bound by it. This presents the first question in the case. The facts lie in a nutshell. Having purchased of Kimball & Whittemore, a gilt mirror and frame, for the sum of \$195, the plaintiff "directed that the same be well packed in a box by the said Kimball & Whittemore, and *delivered in good order* to the Hudson River Railroad Company, for transportation by them by railroad to Fulton, N. Y., but gave the said Kimball & Whittemore no other authority to contract with the carrier, or to execute the release, of which Schedule A is a copy;" The railroad company refused to receive or transport the mirror except upon the terms of the special contract. Had Kimball & Whittemore authority as the agent of the plaintiff to enter into the same?

The authority to the agent was verbal, and therefore entitled to a more liberal construction than would be given to a formal written instrument. (*Story on Agency*, §§ 82-87, 100-103.)

The object to be attained was the transportation of the property to Fulton, and no restrictions or limitations were placed upon the means of doing it, except that it should be by the railroad of the Hudson River Company.

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Opinion of the Commission, per HUNT, C.

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The authority thus to be construed, was to deliver the mirror to the railroad company for transportation. A delivery to a carrier for transportation imports an acceptance by the carrier for that purpose. (Redfield on Carriers, § 95 and following.) The consent of the carrier to receive is as necessary to the completion of a delivery, as is the consent of a grantee in a deed to the delivery of the deed. In neither case can the obligation or the advantage be thrust upon a person without his assent. An authority to deliver for transportation could only be executed by obtaining the consent of the carrier to receive the same. A carrier is not liable for the value of property until he has received the same for transportation, either in fact or in construction of law. If he arbitrarily and illegally refuses to accept the property he may be liable in damages for a breach of his duty, but not as a carrier for the value. (39 N. Y. R., 34.)

Kimball & Co. were authorized, then, to carry this mirror to the starting point of the Hudson River road, and to procure its acceptance by that road for the purpose of being transported to Fulton. This authority must be construed to include all the necessary and usual means of carrying it into effect. In Redfield on the Law of Railways it is said: "As a general rule, the agent to whom the owner intrusts the goods for delivery must be regarded as having authority to stipulate for the terms of transportation." (1 Red. Railways, 22, citing *London v. N. W. R. W. Co.*, 7 H. & N., 600; *Lewis v. G. W. R. W.*, 5 id., 867.) This is in accordance with the general principle. Numerous instances of this character are collected in Story on Agency. Thus, a general authority to collect, receive and pay debts, will authorize settling accounts, adjusting disputed claims, resisting unjust claims, answering or defending suits, as incident to and included in the primary power. (§ 58.) An authority to collect a debt will authorize an arrest of the debtor. An authority to a broker to effect a policy will authorize him to adjust a loss, and to adopt all necessary means to procure an adjustment. An authority to settle losses

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Opinion of the Commission, per HUNT, C.

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on a policy will include a power to refer the matter to arbitration. An authority to sell and convey lands for cash includes an authority to receive the purchase-money. (Id.) An agent who is employed to procure a note to be discounted may, unless expressly restricted, indorse it in the name of his employer, or he may indorse it in his own name, and claim indemnity of his principal. A servant or agent employed to sell, without express restriction as to mode, may sell by sample or with warranty. (§ 59.) Such an authority also includes not only the means necessary and proper, but all the various means which are justified by the usage of trade, thus authorizing a sale upon credit when that mode of sale is justified by the usage of trade. (§ 60.) In other words, the agent is clothed with full authority to use all the usual and appropriate means to accomplish the end, unless a more restricted authority is established. (§§ 73, 102, 103.)

These principles amply justify the authority to make the contract in question by Kimball & Whittemore on behalf of the plaintiff. They were directed to deliver the mirror to the carrier. This required them to procure an acceptance of the article by the company. They were directed in effect to procure "its transportation to Fulton by the railroad company." This could only be accomplished by entering into a contract that it should be transported upon an open carriage, where it was exposed to unusual hazard of injury, and upon specified terms of liability. The mirror must remain uncarried by the Hudson River Company, or this arrangement must be made. The plaintiff's authority was general, and was unrestricted. In my judgment, the contract made, to wit, that it might be shipped upon an open carriage, and that the carrier should not be responsible for any breakage thereof, was within the agent's authority, and is obligatory upon the plaintiff.

It is said in further objection to the right of recovery, that the agreement was without consideration, and for that reason is void. This argument is based upon that section of the statute (§ 36, Laws 1850, chap. 140) which makes it the duty of a railroad company to receive and transport property "on the due

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Opinion of the Commission, per EARL, C.

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payment of the freight or fare legally authorized therefor." They were bound, it is said, to carry it, and there is nothing to show that the defendant could or would have charged a higher price if the property had been transported in a covered carriage. This argument is based upon the assumption that the defendant was bound to carry this mirror at a rate or price fixed by law, and that the law fixed their liability, founded upon that rate or price. I do not understand that either of these assumptions are well founded. The statute fixes no rate of fare, either for mirrors or non-perishable property; for goods carried in covered cars or in open cars. The whole thing is a matter of contract. The company can fix any reasonable rates they think proper, and vary them at pleasure. They received the mirror in question for transportation over their road; they were bound so to transport it; if they failed to deliver it uninjured, they were liable, or not, according as the injury was or was not the result of causes for which they agreed to be liable. The undertaking to carry was the consideration for the agreement of the shipper, as the liability of the shipper to pay the freight was the consideration for the agreement of the carrier to transport. There was a mutual and sufficient consideration; the same that exists in the ordinary case of shipment of goods with or without a special contract.

Without intending to weaken any other ground of defence, by not alluding to it, I am content to place my judgment upon the grounds stated. The plaintiff recovered the full value of his mirror, notwithstanding the injury to it accrued from a cause for which it was expressly stipulated that the defendant should not be liable. This was error.

There should be a new trial, with costs to abide the event.

EARL, C. It is not very important, as I view this case, to determine whether the consignee of goods is, in the absence of any other indication of ownership, to be presumed the owner of the goods shipped. It was held that he was, by one of the learned judges, who wrote the opinion at the General

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Opinion of the Commission, per EARL, C.

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Term, in this case. And such was the dictum of Judge JAMES, in *Sweet v. Barney* (23 N. Y., 335), and of Ch. J. BRONSON, in *Price v. Powell* (3 Com., 322); and by the same learned judge, in *Everett v. Saltus* (15 Wend., 474). But in *York Company v. Central Railroad* (3 Wal., 107), Mr. Justice FIELD held that the consignors, who were in that case not the owners of the property shipped, but the mere agents of the consignees, were to be treated as the owners.

Whether the consignor or the consignee is to be presumed, in the absence of proof, to be the owner of the goods shipped, for the purpose of determining the rights and liabilities of the carrier to the real owner, it cannot well be disputed that the consignor of goods to a distant owner as consignee, must be treated as the agent of the consignee, for the purpose of shipping and consigning the goods, as the consignee of a distant owner who is the consignor is the agent of the latter to receive the goods consigned to him. No other rule would be found practicable or convenient in the extensive commerce of our country, carried on through the agency of common carriers. It was so held in *London and North-Western Railway v. Bartlett* (7 H. & N., 400). In Redfield on Carriers, section 52, the learned author says: "As a general rule, the agent to whom the owner entrusts the goods for delivery must be regarded as having authority to stipulate for the terms of transportation. By this we do not mean the porter or cabman, or mere servant, but the consignor of the goods, or any other agent of the owner, who purchases or procures them for him." In *York Company v. Central Railroad* (*supra*), Trout & Son shipped at Memphis, on the Mississippi, a large quantity of cotton on board a steamer belonging to the Illinois Central Railroad Company, which, by the terms of the bill of lading, was to be delivered at Boston, Massachusetts, the consignees, the York Company, paying freight, "fire and the unavoidable dangers of the river only excepted." In the course of the transit, the cotton was destroyed by fire, and the York Company sued the carriers in the United States Circuit Court for damages. It

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Opinion of the Commission, per EARL, C.

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appeared that Trout & Son were the agents of the company, and that the latter owned the cotton. The defendant had judgment. On error in the Supreme Court, it was objected that the exemption from liability specified in the bill of lading did not bind the plaintiff, because Trout & Son, who were merely agents of the York Company, could not give their assent to such exemption, so as to bind the company; and because, further, there was no consideration for such exemption. Both grounds of objection were considered by the court, and held not to be available. It was held that the consignees were bound by the contract made by the consignor as their agents. The objection of a want of consideration was answered by Mr. Justice FIELD as follows: "There is no evidence that a consideration was not given for the stipulation. The company probably had rates of charges in proportion to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded." There was in the case no proof of a reduced compensation for the carriage on account of the exemption from the risks specified; but the court, in the absence of any proof to the contrary, presumed that there was such a reduction. In the case of *Squire v. New York Central Railroad Company* (98 Mass., 239), the plaintiffs bought hogs in Chicago, and sent a drover to attend and take care of them to Boston. At Suspension Bridge, on the route, they were discharged into the stock-yard of the railroad company; cars were brought to the yard and the hogs loaded into them. The ticket master gave the drover a pass and handed to him at the same time a written contract, saying that he must sign it, and asked him to sign it with the name of the plaintiffs, which he did, without express authority from them. The contract was also signed by the station agent and limited the liability of the railroad company in several important particulars, and, among other things, exempted the company from injury to the hogs from suffocation. Some of the hogs were suffocated before reaching Albany, and, in an action by the owners to



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Opinion of the Commission, per EARL, C.

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recover their value, it was held that the contract was binding upon them, and that the company was not liable. GRAY, J., says: "That even if the drover had no express authority from the plaintiffs to sign any contract relating to their transportation, he was the person in charge of the property, and the only one with whom the defendants could make the necessary arrangements, and stood toward them for this purpose in the position of an owner." See also *Christenson v. American Express Co.* (15 Minn. 270).

In the case under consideration the plaintiff bought the mirror of Kimball, Whittemore & Co., and paid them therefor \$195, and also paid them five dollars for boxing and shipping it, and directed them to deliver it to the railroad company for transportation to him, and gave them no other authority. They thus became the consignors of the mirror, and the agents of the plaintiff for shipping and consigning the same, with all the powers and authority incident to such an agency. The agency was not limited by any instructions of the principal, and hence the agents were general agents in the particular business, possessing all the implied power requisite to do the business in any of the ordinary and customary modes. (*Anderson v. Coonley*, 21 Wend., 279; *Jeffrey v. Bigelow*, 13 id., 518.) Within such limits they stood in the place of the principal, and according to the cases above cited from 3 Wallace and 98 Mass. could be treated with by the carrier as owners.

It appeared that the defendant had for a long time been accustomed to refuse to receive or carry, at its ordinary tariff, large mirrors too bulky to be carried in covered cars, and for that reason liable to extra hazards, unless and until the shippers thereof would execute and deliver a release of liability similar to the release which was executed in this case, and that this custom was well known to the consignors. It matters not that this custom was not known to the plaintiff. It was proper that it should appear, and is important only to show that the alleged contract of shipment was an ordinary and usual one to be made upon the shipment of such property, and hence that it was within the

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Opinion of the Commission, per EARL, C.

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implied authority confided to the consignors by the plaintiff. Hence, I reach the conclusion that the consignors had an implied authority to make the alleged contract; and the next question to be considered is, whether they did in fact make it on behalf of the plaintiff.

The consignors, as above stated, knew that it was usual for the railroad company to exact such a contract and to charge special rates if it was not made. When their cartman delivered the mirror to the company for transportation, it was found to be too bulky to be carried in a covered car and the railroad agent refused to receive it unless the cartman would first sign the contract. Thereupon he, knowing the custom in such cases, signed the contract as "agent for shipper and owner." The railroad agent also signed the same and delivered a copy thereof to the cartman, and it was agreed that the box containing the mirror should be retained in the railroad depot till the next day and should be returned to the consignors if they requested it. The cartman gave the copy of the contract to the consignors and stated to them all the above facts. The contract itself specified that if any objection was made to it, notice was to be given to the freight agent, that a new contract might be made. The consignors did not before the next day request the return of the box or communicate to the defendant's agent any dissent from the arrangement, and the defendant therefore forwarded the box. The cartman was not authorized to make this contract. He was merely the servant of the consignors to deliver this box to the railroad, and was clothed with no discretion to act for them. No authority could be implied from his character and business, and his principals were near at hand, where they could be consulted, and they could act for themselves. But he assumed to act for them and to do what they were authorized to do. They were notified of all the facts, and the contract made by him for them was delivered to them. They were informed that if they had any objection to the contract made by their assumed agent, they should notify the defendant the next day. They made no objection, and expressed no dis-

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Opinion of the Commission, per EARL, C.

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satisfaction with the contract, leaving the defendant's agent to suppose that it was satisfactory to them. It seems to me that these facts constitute a most emphatic and unequivocal ratification of the contract. A subsequent ratification, with knowledge of the facts, of the acts of an assumed agent, is equivalent to an original authority and as this was a contract which the consignors could have deputed the cartman to make for them, it must be treated as if made by them in person and binding upon the plaintiff. We have, then, this contract exempting the defendant from the very risk (breaking) which caused the damage complained of. It cannot be claimed that the contract was illegal because it limited the liability of the defendant as a common carrier, for such contracts are tolerated by the law. It cannot be condemned as extorted from the consignors by the defendant in violation of its duty as a common carrier, because the contract was voluntarily made by them. They had the option either to insist that the defendant should transport the box, without any special contract, subject to the duty and responsibility imposed by law, or to make a special contract for the carriage. They voluntarily chose the latter, and the contract is binding if founded upon a sufficient consideration, and whether it was or not will now be considered.

There is no law regulating the amount of freight which railroad companies may properly charge. They are bound to carry such property as may be offered to them for transportation, upon due payment of freight. They must carry for all upon equal terms, charging one no more than another for freight or property delivered under like circumstances. But they are not bound to carry all kinds of property for the same freight. They may charge ordinary rates for some kinds of property exposed in the carriage to ordinary hazards, and extra rates for property exposed to extra hazards. As railroad companies are *bound* to carry without any contract limiting their liability, their mere agreement to carry does not furnish a consideration for the agreement to limit their liability; nor does their agreement to carry for the price which

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Opinion of the Commission, per EARL, C.

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they would be authorized to charge in case their liability was not limited. (*Bissell v. The N. Y. C. R. R. Co.*, 25 N. Y., 442.) But it is a sufficient consideration if they agree to carry for a reduced compensation because their liability is limited. In *York Company v. Central Railroad (supra)* it was held that where there was an agreement limiting the liability of the carrier, it would be presumed, in the absence of proof to the contrary, that it was upon the consideration of a reduced compensation for the carriage. Such a presumption is not unreasonable, but it is not necessary to indulge in it in this case. Here the consideration of the restricted liability was not simply the agreement of the defendant to carry, but to carry at "tariff rates." This was a consideration satisfactory to the parties. How can we say, in the absence of proof, that "tariff rates" meant the full rate which could be charged for freight upon the mirror? In view of all the facts and circumstances disclosed, it is clear that "tariff rates" meant a less rate than the defendant was authorized to charge for the carriage of mirrors and other articles exposed to extra hazard. Here, then, the consideration for the agreement to limit the defendant's liability was the agreement to carry for a reduced compensation, and we reach the conclusion that the contract was a valid, binding contract between the plaintiff and the defendant.

The only further question to be considered is whether the defendant discharged its duty under the contract. The receipt given by defendant's freight agent, at the time of the execution of the above mentioned contract and the delivery of the box, is as follows: "Received from Kimball, Whittemore & Co., in good order, on board the N. Y. C. R. R., for Fulton, N. Y., the following package: One box, mirror, marked W. S. Nelson, Fulton, N. Y." There is an evident mistake in this receipt. The box was not received on board the New York Central railroad, or on board of any other road. It was received at the depot of the defendant in New York, to be carried over its road, connecting with the New York Central railroad at Troy. Some words are manifestly omitted,

## Statement of case.

and the receipt should probably have stated that the box was received to be delivered on board the New York Central railroad. It must be read as if some such words were contained in it, and it must be construed in connection with the contract executed at the same time. The two instruments together show clearly that the defendant undertook the duty of an intermediate carrier, to take the box and carry it to Troy, the terminus of its route, and there to deliver it on board of the New York Central railroad. There is nothing, either in the two instruments or in the circumstances surrounding the transaction, from which we can infer that the defendant undertook to carry the box to Fulton, far beyond the terminus of its road. Hence, the defendant discharged its duty when it carried this box to Troy and tendered it for carriage to the New York Central Railroad Company. Upon the refusal of the latter company to receive and carry it, it should have notified the plaintiff of such refusal. But as the neglect to notify the plaintiff caused him no damage, it is of no consequence in this action.

Having thus carefully examined the important questions raised and discussed in this case, I have reached the conclusion that the plaintiff was not entitled to recover, and the judgment must be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

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THE WESTERN RAILROAD COMPANY, Appellant, v. MICHAEL A. NOLAN et al., THE BOARD OF ASSESSORS OF THE CITY OF ALBANY, Respondents.

Trustees, in whom is the title to a trust fund, are the proper parties plaintiff in an action to maintain and defend the fund against wrongful attack or injury, tending to impair its safety or amount. Neither the *cestuis que trust* nor beneficiaries can maintain such action against a third person, except in case the trustees refuse to perform their duty, and then the trustees should be made parties defendant.

SICKELS—VOL. III. 65

48	513
121	249
48	513
126	212
48	513
144	61
48	513
170	1609
48	513
172	48
48	513
78	AD' 7

## Statement of case.

Assessors are *quasi* judicial officers; their assessments are in the nature of judgments. They are not subject to an action to review, modify or reverse their judgments, nor to hold them to personal liability, when acting within their jurisdiction. Their judgments can be reversed by action for fraud, mistake or other cause, giving jurisdiction to courts of equity; but it is the parties affected by the judgment who must be brought into court to litigate, not the judges.

It is ministerial, not judicial officers, whom the court has power to restrain when proceeding illegally under a claim of right. The process of injunction, in a proper case for staying a judgment, goes against the parties, not the tribunal or its judges.

The rule denying the right to interfere by injunction to restrain the collection of a tax, is one of public policy, and it is equally applicable to the case of an assessment.

The remedy by *certiorari* is the proper one to review an assessment.

(Argued January 6, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial district, affirming a judgment dismissing plaintiff's complaint.

The action was brought to restrain the defendants, as assessors of the city of Albany, from assessing the sum of \$500,000, for personal property, against Joseph C. Y. Paige and Thomas W. Olcott, trustees, for the purpose of taxation. The said sum was held by Paige and Olcott as trustees, under certain tripartite contracts, dated in 1840, 1841 and 1849, between the city of Albany of the first part, the Albany and West Stockbridge Railroad Company (a corporation of the State of New York), of the second part, and the plaintiff (a corporation of the State of Massachusetts), of the third part. Under these contracts the city of Albany issued its bonds to the plaintiff for \$1,000,000, payable one-fourth in twenty-five years, one-half in thirty years, and the remaining one-fourth in thirty-five years from June, 1840, with interest coupons at six per cent per annum, payable semi-annually; the plaintiff agreeing to apply one-tenth of the proceeds of the bonds to the creation of a sinking fund, to be held, managed and controlled by two trustees, one of whom should be the chamberlain for the time being of the city of Albany, and the other to be nominated by the plaintiff, who was

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Statement of case.

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required to keep the fund invested, together with an additional one per centum on the amount of the said bonds, to be contributed annually to the said fund by the plaintiff, and accumulate the said fund for the purpose of retiring the said bonds at maturity, paying the surplus to the said plaintiff. The residue of the proceeds of the said bonds the plaintiff agreed to apply to the construction of the Albany and West Stockbridge railroad, which completed a through line of railroad communication from the eastern terminus of the plaintiff's railroad in Massachusetts to the city of Albany. The city of Albany also agreed to subscribe for \$1,000,000 in the stock of the Albany and West Stockbridge Railroad Company, to be held by said city in consideration of the issue of said city bonds, of which stock the plaintiff was to become the owner as fast as it retired the said bonds; and the agreement appears to contemplate that the plaintiff would become the lessee of the said West Stockbridge railroad, until the plaintiff became the owner of said railroad by payment of the said city bonds; and the plaintiff also agreed to pay the interest on the bonds as it became due, as a rent for the use of the said West Stockbridge railroad. This agreement was carried into effect; the said bonds were issued, and were outstanding at the commencement of the action; and the said sinking fund amounted, with all the annual payments of the plaintiff thereto, and the accumulations thereon to \$916,489.41, of which the said Paige and Olcott were then in possession and the actual trustees. This fund was invested by the trustees in the name of the plaintiff and the city of Albany, on bond and mortgage to the amount \$322,529, and the residue in the stocks of the State and general government, and in bonds of the city and county of Albany, cash on hand, and bonds of the New York Central Railroad Company. The judge, before whom the action was tried without a jury, found that the defendants were assessors of the city of Albany; that, as such, they had determined that the said fund was liable to taxation, and, in pursuance of their determination, had

## Statement of case.

entered in the assessment roll of the said city the amount of \$500,000 for personal property in the names of Thomas W. Olcott and Joseph C. Y. Paige, trustees as aforesaid. That the plaintiff had no other property in the city and county of Albany, except office furniture of the value of fifty dollars. That the plaintiff had, in due time, presented to the defendants, as assessors, proof of the said facts, and requested them to strike the said assessment from the assessment roll, and that the assessors declined to accede to it, but determined to assess the said fund for the purposes of taxation. That the defendants were not of sufficient pecuniary responsibility to respond to the plaintiff in damages if it should be determined that the said fund was not liable to taxation. That the plaintiff is a foreign corporation, created under the laws of the State of Massachusetts.

The plaintiff requested the judge to decide that the said fund was not liable to be assessed for the purposes of taxation, and that the plaintiff was entitled to an injunction restraining the defendants, as assessors, from assessing the said fund for taxation, and from assessing the said trustees for the said fund; but the said judge held and decided that the plaintiff was not entitled to the relief demanded, and adjudged that the complaint be dismissed with costs. The plaintiff duly excepted to such refusal to find as requested, and to the decision so made by the said judge.

The defendants thereupon entered judgment, dismissing the complaint, with costs.

*John H. Reynolds* for the appellant. The fund in question belonging in fact to a non-resident, is not subject to taxation. (*Lord v. Arnold*, 18 Barb., 105; *Hoyt v. Com. of Taxes*, 23 N. Y., 224, 240; *Story's Con. of Laws*, 309-314; 2 Kent, 401.) The court has power to restrain the assessment by injunction. (*Chegary v. Jenkins*, 1 Seld., 376; *Mohawk & Hudson R. R. Co. v. Archer*, 6 Paige, 83; *Belknap v. Belknap*, 2 I. C. R., 463; *Livingston v. Living-*



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Opinion of the Commission, per LEONARD, C.

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ston, 6 id., 467; 1 Story Eq. Jur., § 252; *Cooper v. Alden*, Harrington Eq., 72; *McCord v. Iker*, 12 Ohio. 387.)

*Samuel Hand* for the respondents. The trustees of an express trust are the only proper parties to protect the fund. (Code, § 113; *Church v. Stewart*, 27 Barb., 553.) The court will not interfere by injunction to restrain assessments for taxation, save where the assessment would affect lands. (*Magee v. Cutler*, 43 Barb., 240; *Susquehanna Bank v. Supervisors of Broome County*, 25 N. Y., 313; *Mayor v. Messerole*, 26 Wend., 132; *Life Ins. Co. v. Supervisors*, 4 Duer, 192; *Betts v. Williamsburgh*, 15 Barb., 255; *Heywood v. Buffalo*, 4 Kern., 534; *The Mut. Ins. Co. v. Sup. N. Y.*, 8 Bos., 683; *Wilson v. Mayor of N. Y.*, 4 E. D. Smith.) The proceedings can be reviewed by certiorari. (40 N. Y., 154.) Irresponsibility of defendants no ground for equitable jurisdiction. (*Watson v. Hunter*, 5 J. Ch., 169.)

LEONARD, C. While the plaintiff has an important interest in the sinking fund, it is not under its control or management, nor is the title to it vested in it. It has such an interest as would enable it to compel an accounting by the trustees, or maintain an action against them for the correction of an abuse of the fund. The plaintiff has agreed to indemnify the city of Albany from injury by losses to the fund, and is thereby indirectly bound to maintain it, or to pay the bonds, amounting to \$1,000,000, with the interest; and the plaintiff is also entitled to the amount of the trust funds remaining, after the said bonds, with the interest, have been satisfied or paid. Perhaps it might maintain an action against third parties for the protection or defence of the fund, in case the trustees should, on request, refuse to institute the proper action or proceedings for that purpose. The plaintiff should be regarded as a *cestui qui trust*, and interested in the said fund. The trustees are the parties in whom the fund is vested, and whose duty it is to maintain and defend it against wrongful attack or injury tending to

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Opinion of the Commission, per LEONARD, C.

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impair its safety or amount. The title to the fund being in them, neither the *cestuis qui trust* nor the beneficiaries can maintain an action in relation to it, as against third parties, except in case the trustees refuse to perform their duty in that respect, and then the trustees should be brought before the court as parties defendant. There is nothing in the case proving any refusal or reluctance on the part of the trustees to perform any duty which they ought to assume in vindicating the fund from illegal assessment or taxation. The plaintiff has not, for these reasons, made any case entitling it to bring this action.

There are other technical objections to this action which are insurmountable.

The assessors are *quasi* judicial officers when acting within the sphere of their jurisdiction, and their assessments when made become judgments to be enforced by a warrant, in the nature of a special execution, to be issued by the supervisors of the county. The assessors are not subject to an action to review, modify or reverse their judgments, nor to hold them to personal liability when acting within their jurisdiction. (*Barhyte v. Shepherd*, 35. N.Y. R., 238, and cases there cited). Their judgments can be reviewed by action for fraud, mistake or other cause giving jurisdiction to courts of equity, but it is the parties affected by the judgment who must be brought into court to litigate, and not the judges.

The public officers which the court has the power to restrain when proceeding illegally under a claim of right, injuriously affecting the property or rights of a party, referred to by the chancellor in the case of the *Mohawk and Hudson Railroad Co. v. Archer* (6 Paige R., 83), and other cases there cited, particularly referred to by the learned counsel for the plaintiff, are ministerial and not judicial officers. The process of injunction in a proper case for staying a judgment goes against the parties, and not against the tribunal or its judges.

The law is also well settled that the courts will not interfere by injunction to restrain the collection of a tax, unless

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Opinion of the Commission, per LEONARD, C.

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the case were brought within some acknowledged head of equity jurisprudence. An action lies where the tax is upon land, which is liable to be sold to collect it, and the conveyance to be executed by the proper officer would be conclusive evidence of title, and the tax was not void on its face; or where there might otherwise be a multiplicity of suits.

It is said by the Court of Appeals, in the case of the *Susquehanna Bank v. The Supervisors of Broome County* (25 N. Y. R., 312, 314), that there is no more reason for entertaining a suit to restrain the collection of a tax, than there would be, where, in an action for the recovery of money, a party had a judgment against him upon an erroneous ruling of the law. (*Vide*, page 314, and other similar cases there cited.) The rule denying the right to interfere by injunction to restrain the collection of a tax, is one of public policy, and it is equally applicable to the case of an assessment. The measures adopted for equalizing and gathering the public revenue, and the means of paying the demands of the creditors of the government, as well as carrying on or continuing the public business, ought not to be restrained or delayed at the suit of private parties. The rule that equity will not interfere by injunction, where there is a sufficient remedy at law, is equally well settled. The remedy by certiorari has been repeatedly adopted and sustained by the Court of Appeals in such cases. If promptly urged, upon proper proofs presented to the assessors in due season, this remedy is adequate for the correction of all the errors and injustice liable to be committed in the performance of their official duties.

It being fully shown that this action cannot be maintained, it would be a work of supererogation to examine the question whether the fund is liable to taxation or assessment in the city of Albany. That question is not properly before the court.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JAMES R. HILLS, Respondent, v. GEORGE PLACE, Appellant.

The naming of a bank in a promissory note as the place of payment, does not make the banking association an agent for the collection of the note or the receipt of the money. No power, authority or duty is thereby conferred upon it in reference to the note.

No presentment at the place named is necessary to give a right of recovery against the maker. It only relieves him from damages if he was ready at the time and place named to pay it, and there was no one to receive it. Such readiness is equivalent to a tender, and an answer pleading that fact, and payment of the money then due into court, will be a bar to the recovery of interest and costs, but not to the cause of action.

Where, therefore, the maker has put funds in the bank sufficient to pay the note when due, and has given instructions to pay upon presentation, but, the note not having been presented at maturity, has thereafter withdrawn the funds and has not brought the money into court, the owner of the note is entitled to judgment thereon for both principal and interest.

(Argued January 6, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment entered in favor of the plaintiff on a verdict.

The action was brought to recover the amount of a promissory note, made by the defendant, payable one month after date, at the Hanover National Bank of the city of New York, to the order of D. Russel, and by him indorsed to the plaintiff.

The judge, on the trial, after the testimony was closed, directed the jury to find a verdict for the plaintiff for the amount of the note and interest, to which direction an exception was taken by the defendant.

The facts material to the decision of the case in this court are sufficiently stated in the opinion.

*H. C. Place* for the appellant. Defendant had until three o'clock to pay the note. (*Oslome v. Moncure*, 3 Wend., 170; *Smith v. Aglesworth*, 40 Barb., 104; *Chitty on Bills*, 406; 12 Johns., 423.) Defendant was only required to deposit the

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Opinion of the Commission, per LOTT, Ch. C.

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money in the bank; this was done, and the defendant cannot be held liable for costs nor interest. (*Fulton and others v. Goundy*, 13 East's R., 459; *Sanderson v. Bowes and others*, 14 id., 50; *Dickinson v. Bowes and others*, 16 id., 110; *Gammmon v. Schmoll*, 5 Taunt., 344; 21 Pick. and cases cited, 310.) Defendant was entitled to judgment, barring plaintiff from the recovery of costs and subsequent interest. (4 Johns. R., 183; 17 id., 248; 13 East., 473; 21 Pick., 310; *Bowes v. Howe*, 5 Taunt., 30.)

*J. R. Hills*, for the respondent, in person. The refusal to pay, when the note was presented, made defendant liable. (*Halliday v. Hart*, 30 N. Y., 493; *Whitwell v. Brigham*, 19 Pick., 122; *Staples v. Franklin Bank*, 1 Met., 43; Story on Prom. Notes, § 226; *Shed v. Brett*, 1 Pick., 401; *City Bank v. Cutler*, 3 Pick., 414; *Greely v. Thirston*, 1 Greenl., 479; *Bank of Cooperstown v. Wood*, 28 N. Y., 567.) The defence is in effect a tender; the money should have been brought into court and the fact averred in answer. (*Haxton v. Bishop*, 3 Wend., 21; *Caldwell v. Cassedy*, 8 Cow., 271; 2 Greenl. Ev., § 600; *Hamilton v. Van Rensselaer*, 43 N. Y., 247.)

LOTT, Ch. C. The evidence given on the trial, most favorably construed to the defendant, does not prove payment, or establish facts sufficient to bar a recovery for damages and costs, as well as the principal of the note.

It shows that the note was presented for payment on behalf of the plaintiff at the Hanover National Bank, where it was made payable, about eleven o'clock of the day it fell due, and that it was not then paid; that the defendant, on being notified of the fact by the cashier, immediately thereafter, between eleven and twelve o'clock, "put funds in the bank and gave instructions to have it paid on presentation."

It was not presented for payment to or at the bank or to the plaintiff, at any time or place after the funds were so left, before the commencement of this action.

The cashier of the said bank, on being asked "what is the

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Opinion of the Commission, per LOTT, Ch. C.

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custom of banks in the city of New York in reference to presenting notes?" answered, "that the custom is to present a note for payment between ten and three o'clock, but a man has until three o'clock to pay his note, and it cannot be protested until after three o'clock." He also stated that ordinarily notes are presented between ten and three o'clock, and if a note is not paid on the first presentation thereof, that it is necessary to present it again on the second time, according to custom, and that "the notary never goes until three o'clock."

It is clearly established, by the preceding statement, that the note in question was never in fact paid to the plaintiff, but it is shown, on the contrary, that the funds which were left at the bank, to be applied to its payment on presentation, were shortly thereafter actually withdrawn by the defendant himself.

There is no ground for the theory or claim of the defendant's counsel, that "the parties agreed in the note to make the Hanover Bank the mutual receiving agent, and a payment to that agent on the third day of grace of the \$230 to pay the note, and an acceptance of that by the agent, was a payment of the note, and the maker had then discharged his obligation, and the holder had only to go to the common agent, the bank, and receive the money."

The bank was in no sense the plaintiff's agent for the collection of the note, or the receipt of the amount due thereon, or otherwise.

It was named, in the connection in which it was used, merely as the *place* where its business was transacted, for the purpose of making payment of the note *there*, without conferring or intending to confer any power, authority or duty on the association itself in reference thereto.

Such designation did not make it incumbent, as a precedent condition, to create a liability or obligation by the maker of the note to pay it or to give a right of a recovery thereon, that it should be presented at that particular place for payment. The effect or consequence of an omission or failure

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Opinion of the Commission, per LOTT, Ch. C.

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to make such presentment was not to exonerate the maker from his promise to pay what he had agreed, but only to relieve him from damages in case he was ready at the time and place appointed to pay it, and there was no one there to receive the money. Such readiness is considered equivalent to a tender of the sum payable, and an answer pleading that fact, and a payment of the money due into court, would be a bar to a recovery of interest and costs, but not to the cause of action.

This principle is settled by the decisions in *Wolcott v. Van Santvoord* (17 John., 248) and *Caldwell v. Cassidy* (8 Cow., 271).

The custom referred to by the cashier does not interfere with that principle. It evidently does not affect the maker's liability. It only shows that the usual banking hours are allowed him to make his payment, and that his note cannot be protested till they have passed.

Assuming that the leaving of the money in the bank, after the demand made by the plaintiff, was sufficient proof of his readiness to pay the note, and is to be considered as a tender of payment in due time, yet he has entirely failed to show that he ever brought the money into court; and as a protest is never necessary to charge or hold the maker, it follows, from the views above expressed, that the plaintiff was entitled to recover the amount of the note, with interest; and, there being no disputed questions of fact, the court was authorized to give a direction to the jury to find a verdict in favor of the plaintiff, for both principal and interest.

It is, therefore, unnecessary to consider the sufficiency of the exception to that direction, so far as it related to the right to recover interest, or what was the effect of the presentment of the note and the refusal to pay it before the deposit of the funds to meet it. The judgment appealed from must be affirmed, with costs.

All concur.

Judgment affirmed.

THE FIRST NATIONAL BANK OF SANDY HILL, Respondent,  
v. IRA FANCHER, Appellant.

The authority given to a tax collector by his warrant is special and exceptional, and must be pursued according to its terms.

Where, upon an assessment roll, there appears an assessment against a stockholder in a bank for the amount of his stock, under the usual warrant attached, directing the collector to collect from the persons named, and to levy the same of their goods and chattels, the collector is not authorized to levy upon and collect the same of the property of the bank, although the bank holds funds with which the tax should have been paid. A contract between the bank and its stockholders cannot thus be enforced.

An assessment upon the shares of a national bank, under the act of 1865 (sec. 10, chap. 97, Laws of 1865), is invalid and cannot be enforced. (*The City of Utica v. Churchill*, 33 N. Y., 161, overruled under authority of *Van Allen v. Assessors*, 3 Wal., 573.)

(Argued January 6, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial district, affirming a judgment in favor of plaintiff, entered upon the decision of the court upon trial at circuit, without a jury. (Reported below, 52 Barb., 138.)

This was an action for trespass, in taking from plaintiff's possession currency to the amount of \$119.27. Defendant justified as collector of the village of Sandy Hill, under a warrant issued to him by the trustees of said village. The warrant commanded him to collect from the *several persons therein named* the sums assessed against them respectively. Plaintiff's shareholders were assessed for their stock. Their names, the number of shares (described as bank stock), the amount and amount of tax were entered upon the roll. The tax not having been paid, defendant called at plaintiff's banking-house and demanded payment, and, upon refusal, levied upon and seized the money. All the stockholders resided in the village, and possessed personal property therein.

*L. H. Northrup* for the appellant. Bank shares are personal



Opinion of the Commission, per HUNT, C.

property, and taxable as such. (§§ 12, 41, chap. 106, Laws of Con., 1864; *City of Utica v. Churchill*, 33 N. Y., 161; *Van Allen v. Assessors*, 3 Wal., 573; 41 How., 493.) Even if the law taxing the stock was void it would not affect this case. (41 How., 493; 37 N. Y., 511.) The system of taxation for municipal purposes is distinct and independent of that for county and State purposes. The shares are taxable for the former. (*Mayor, etc., of Troy v. The Mutual Bank*, 20 N. Y., 387; *The American Transportation Co. v. The City of Buffalo*, 23 Barb., 272; *Same Case*, 20 N. Y., 388.) The assessors acted judicially. (*Chega v. Jenkins*, 1 Seld., 376, 381; *Weaver v. Devendorf*, 3 Denio, 117; 41 How., 493; 37 N. Y., 511.) And the only way to review their acts is by a direct proceeding for that purpose. (*Porter v. Purdy*, 29 N. Y., 106; 37 id., 511; 41 How., 493.) The roll and warrant were regular, and protected defendant. (*Sheldon v. Van Buskirk*, 2 Comst., 473; *Savacol v. Boughton*, 5 Wend., 170, approved in *Porter v. Purdy*, 29 N. Y., 113; *Abbott v. Yost*, 2 Denio, 86; 37 N. Y., 511; 41 How., 493.) The State has power to compel a national bank to pay the taxes of its shareholders. (*National Bank v. Commonwealth*, 9 Wal., 353.) It is not essential that the levy should be made on the chattels of the person named in the assessment roll. (10 Wend., 346; 27 Bar., 34; 39 id., 479.)

*U. G. Paris* for the respondent. The assessment was invalid. (*Van Allen v. The Assessors*, 3 Wal., 573.)

HUNT, C. The warrant in the hands of the defendant, as collector, directed him to collect the amounts specified from the persons named, and "to levy the same of the goods and chattels of such persons." Assuming the regularity of the assessment, that the property was subject to the assessment made, and that the bank held the funds with which the tax should have been paid, the defendant is not justified. By his warrant, if necessary to obtain payment, he was authorized to levy upon the goods of the persons named. No other authority

was confided to him. This authority is special and exceptional. It must be pursued according to its terms. Allen Brothers were the first persons named in the assessment roll given in evidence. Their property was assessed at \$10,000, and a tax of sixteen dollars was imposed upon the same. This tax the collector was authorized and directed to collect by a levy and sale of the goods and chattels of the Messrs. Allen, if this sum should not be voluntarily paid. But he had no authority to levy upon the goods of another person to make this sum. His authority did not reach to that extent. He probably had no authority to make such levy and sale, even with the consent of such other person. His authority was limited to two precise acts; first, to receive a voluntary payment; second, if such payment was not made, to levy upon and sell the goods of the persons named in the tax list. If the Sandy Hill Bank had undertaken to pay these taxes, there was probably a way in which the performance of their engagement could have been enforced, if payment could not have been otherwise obtained. But it is too clear for argument, that a tax collector could not enforce such an agreement by a seizure and sale of the property of the bank.

The assessment upon the shares of a national bank was for a tax imposed by authority of the State of New York. It was made in the autumn of the year 1865, and by virtue of the statute of the State of New York, passed in that year. (Laws 1865, ch. 97, § 10, p. 172.) It has been expressly adjudged by the Supreme Court of the United States (*Van Allen v. The Assessors*, 3 Wal., 573) that this statute was invalid, and that a tax imposed under its authority could not be enforced. *The City of Utica v. Churchill* (33 N. Y., 161), holding the contrary doctrine, was reversed by the case of *Van Allen v. The Assessors*. The tax sought to be enforced in this case was not therefore legally imposed. The judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

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Statement of case.

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HENRY CONKLIN, Appellant, v. WILLIAM H. FURMAN et al.,  
Respondents.

As under the provisions of the "Act to provide for the incorporation of companies to construct plank-roads," etc. (chap. 210, Laws of 1847), in order to enforce the personal liability given by said act (§ 44) against stockholders, provision is made that a joint action may be prosecuted against the company and any one or more stockholders liable to contribute to the payment of its debts; the moment a cause of action accrues against the company it accrues against each stockholder liable, and as to them the statute of limitations begins to run. If therefore an action against a stockholder is not commenced within the period prescribed by the statute of limitations, it is barred. (EARL, C., dissenting.)

(Argued January 6, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial district, reversing a judgment entered upon the decision of the court upon a trial at circuit, without a jury, and ordering a new trial.

This action was brought in June, 1862, against the defendants, who, as the complaint alleged, were severally stockholders in the Newtown and North Hempstead Plank-road Company, organized in 1854 under "An act to provide for the incorporation of companies to construct plank-roads, and companies to construct turnpike roads," passed May 7th, 1847, which company, as the complaint also alleged, became in January, 1855, indebted to the plaintiff, "to the amount of several thousand dollars," for services performed and materials furnished by him to the company in the construction of its road; that on the first of June of the same year (1855) he commenced an action in the Supreme Court of this State against the company to recover the indebtedness of the company to him, and on the ninth day of August, 1860, he recovered judgment therefor for the sum of \$5,493.97, and issued execution thereon to the sheriff of the proper county, which was returned unsatisfied, except twenty-five dollars, and that the balance remains unpaid; that defendants were respectively liable to the amount of stock (stating it) subscribed and held

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Opinion of the Commission, per GRAY, C.

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by each of them. The answer, among other things, set up the statute of limitations. On the trial the plaintiff proved the recovery of judgment and the issuing and return of execution thereon, as stated in his complaint, and rested. Whereupon the defendant moved a nonsuit upon the ground, among others, that the action was barred by the statute of limitations. The motion was overruled and the defendant excepted. The court ordered judgment in accordance with the plaintiff's claim, which was accordingly entered.

*Samuel Hand* for the appellant. In the construction of a statute, effect should be given to every part of it. (1 Black. Com., 89; 2 Rol., 27; 17 J., 475, 477; Potter's Dwarria, 189; 2 Story Rol., 389.)

*Abraham Lott* for the respondent. Plaintiff's right is barred by the statute of limitations. (*Corning v. McCullough*, 1 Com., 54-56, 75, 76; *Bailey v. Boucher*, 3 Hill., 188; *Wetherhead v. Allen*, 28 Barb., 661.)

GRAY, C. The act of 1847, under which the company in which the defendants are stockholders was organized, made the respective stockholders therein liable for the debts of the company, to a limited extent (chap. 210, Sess. Laws, 1847, § 44), and, in order to enforce the collection of such debt, provision was made, by § 46 of the same act, that the creditor, prosecuting the company for the recovery of the same, might include one or more of the stockholders liable to contribute to its payment but in case of a recovery against the company and the stockholders, no execution could be levied on the property of the stockholders, except for such deficiency as might remain unsatisfied after the property of the company had been levied upon and applied thereto. The moment the right of action accrued against the company it accrued against each stockholder, and unless the action was commenced within six years after it accrued, it was barred (Code, § 91), unless a different limitation is prescribed by statute, in § 74, or unless

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Opinion of the Commission, per GRAY, C.

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the action has been stayed by injunction, or statutory prohibition in § 105. It is not pretended that this action was commenced within six years after the cause of action accrued against the company and the defendants, or that any different limitation than six years has been prescribed for commencing an action against the company and the defendants, as stockholders, and prosecuting the same with precisely the same results that would follow suing the company to judgment first, and then, in case of the return of an unsatisfied execution, suing the stockholders; but it is insisted that because, by the same section which authorized the suing the company and the stockholders jointly, permission was given after judgment should be recovered in a separate action against the company, and an execution thereon should be returned unsatisfied, and not before, to sue one or more of the stockholders for the recovery of the debt, that the action against the stockholders was not barred until the expiration of six years after the return of the execution against the company. It should be borne in mind that the result is the same whether the stockholders are sued jointly with the company or separately, after judgment and execution against the company; in either case the property of the stockholders is exempt from levy, except for whatever deficiency may remain after the property of the company has been levied upon and applied to the extinguishment of the debt; and hence that no advantage could result to the creditor by prosecuting the company and the stockholders separately that would not result from a joint action against both. "The statute of limitations was intended as a statute of repose, to prevent fraud and to afford security against stale demands which might be made after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses." If permission to sue the stockholders separately, after judgment and execution against the company, could give the creditor more than six years after the cause of action accrued against both, then the creditor might, on the last day of the six years after the cause of action accrued, sue the company; and then, in case

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Dissenting opinion, per EARL, C.

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of a recovery of judgment and return of an execution thereon unsatisfied, delay until the last day of another six years, and then sue the stockholders; so that, in the event of his disposition to sue separately, the right of action would be extended more than twelve years instead of six; and if it should happen that the litigation against the company should be protracted (as is often the case) ten or more years, that period added would extend the limitation more than twenty years from the accruing of the action, during the whole of which the stockholders may remain in ignorance of even an assumption of a claim against the company, and subject, if the ground taken by the plaintiff can be sustained, to all the evils of delay against which it was the object of the statute to guard. Unless, therefore, there is to be found an express provision or an implication necessarily implied from an express provision of the statute, fixing a different limitation than six years after the cause of action accrued against the company and the stockholders jointly, this action should be held to be barred. That more than six years before the commencement of this action elapsed after an action accrued in which the company and the defendants might have been sued jointly, is not doubted; and that no advantages could accrue to the plaintiff in this action that would not have accrued in that. Where, under such circumstances, the right to sue accrued, "the obligation of diligence attached and laches began," the plaintiff was not hindered from pursuing a complete remedy, "by injunction or any statutory prohibition." He doubtless had the right to sue the company first; the statute gave it to him, but it did not compel him to take it; his election was voluntary, and at the risk of collecting his debt against the company, or having his claim against the stockholders barred before his litigation with the company should terminate, unless he should voluntarily abandon it and avail himself of his joint action, in which he had a complete remedy. For the reasons stated I am for affirming the judgment appealed from.

EARL, C. (dissenting.) Section 44 of the plank-road act (chap.

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Dissenting opinion, per EARL, C.

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210, Laws of 1847) provides that the stockholders of every plank-road company "shall be liable in their individual capacity for the payment of the debts of such company for an amount equal to the amount of the stock severally held by them over and above such stock;" and it is provided in section 46 that "in any action against any corporation formed under the provisions of this act, the plaintiff may include as defendants any one or more of the stockholders of such company who shall, by virtue of the provisions of this act, be claimed to be liable to contribute to the payment of the plaintiff's claim; and if judgment be given against such company in favor of the plaintiff, for his claim or any part thereof, and any one or more of the stockholders, so made defendants, shall be found to be liable as aforesaid, judgment shall also be given against him or them, and shall show the extent of his or their liability individually;" but the execution on such judgment can only be levied on the property of the stockholders for any deficiency that may remain unsatisfied after the property of the company has been levied on and applied thereto.

The same section also declares that "suits may be brought against one or more stockholders, who are claimed to be liable for any debt owing by the company, or any part of such debt, without joining the company in such suit; but no such suit shall be so brought until judgment on the demand shall have been obtained against the company, and execution thereon returned unsatisfied, in whole or in part, or the company shall have been dissolved."

It will thus be seen that two remedies are given to every creditor of such company, of which he has the choice; to sue the company and join in such suit any of the stockholders; or to sue any of the stockholders after he has first sued the company, and has failed by an execution to obtain satisfaction; and in this case the latter choice was made.

This action was commenced more than six years after the debt was created, but within about one year after the execution in the suit against the company had been returned unsatisfied.

## Statement of case.

The General Term held that the action was barred by the statute of limitations, and upon that ground alone reversed the judgment in favor of the plaintiff entered at the circuit, and granted a new trial.

The plaintiff claims that his cause of action is saved from the statute of limitations by section 105 of the Code, which provides that "when the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuation of the injunction or prohibition shall not be part of the time limited for the commencement of the action."

I am of the opinion that the action was not barred. It did not accrue, and could not have been commenced until the execution against the company was returned unsatisfied; and hence the time limited for its commencement is to be computed from that time. (Angell on Lim., 46.) It matters not that the plaintiff might have pursued his remedy in another form against the company and any of the stockholders. He was not obliged to pursue that remedy. He had the right to rely upon this action as his remedy. And the only question for us to consider is, when he had the right to commence this action, and this, we find, was in June, 1861. Hence, the General Term erred in holding that the action was barred.

For affirmance, GRAY, LEONARD and HUNT, CC.

For reversal, EARL, C. ; LOTT, Ch. C., not sitting.

Judgment affirmed. ✓

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THE RECTOR, CHURCH-WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, Appellants, v. ALBINA HIGGINS, Respondent.

A covenant in a lease whereby the lessee agrees to bear, pay and discharge all taxes and assessments which shall be imposed upon the demised premises during the term, is broken when the lessee neglects to pay a tax or assessment duly imposed. It is not simply a contract of indemnity, but by it the tax or assessment, as between the parties, becomes the debt of the lessee. The lessor therefore can maintain an action thereon without first paying the tax or assessment, and as damages he is entitled to recover the amount of such tax or assessment.



## Statement of case.

Parties have the right to make a contract contravening the rule that actual compensation will only be given for actual loss, and when the intent so to do is expressed in apt and suitable language courts of justice will enforce it.

The fact that neither the particular tax or assessment, nor the time of payment, nor the person or corporation to whom payable are stated in the covenant, does not make it one for indemnity merely. That is certain which is capable of being rendered certain.

Nor is it an objection that there is a risk attendant upon the payment of the judgment without prepayment of the tax or assessment. The lessee can make payment even after judgment, and upon application to the court after such payment the collection of the judgment, except as to costs, will be stayed, and upon payment of costs satisfaction will be ordered.

(Argued January 8, 1872; decided May term, 1872.)

APPEAL from order of the Superior Court of the city of New York setting aside a verdict in favor of plaintiff and granting a new trial.

The action is upon a covenant in a lease of premises in the city of New York, by the plaintiffs to the defendant, whereby the defendant covenanted, among other things, to "bear, pay and discharge all such duties, taxes, assessments and payments, of what nature or kind soever, as should, during the term aforesaid, be imposed on, or grow due or payable out of, or for, or by reason of the said devised premises, or any part or parcel thereof." The term was twenty-one years, commencing May 1, 1856. Two assessments were imposed by the city authorities in March, 1859, amounting to \$4,875, constituting liens upon the demised premises for widening and extending Reade street. The action appears to have been brought in 1863, the defendant not having paid the said assessments. It also appeared that the assessments remained wholly unpaid, and no evidence was offered to show that any proceedings had been taken by the corporation of the city of New York to enforce the collection thereof.

The defendant raised several questions at the trial as to the regularity and validity of the assessments, and, at the close of the evidence, moved to nonsuit the plaintiffs and to

## Statement of case.

dismiss the complaint, upon the ground that the assessments had not been paid by the plaintiffs and that they had failed to show that they had sustained any damage. The motion was denied and the defendant excepted.

The court directed the jury to find a verdict for the plaintiffs for \$8,000, subject to an adjustment of the amount, and directed the exceptions to be heard at the General Term in the first instance.

The parties stipulated that, upon this appeal, the argument shall be confined to the right of the plaintiffs to bring their action prior to the payment by them of the assessments in question.

*Amasa J. Parker* and *G. M. Ogden* for the appellants. Plaintiffs were entitled to recover, as damages, the amount of the assessments and interest. (*Tyler v. Ives*, cited in *Gilbert v. Wyman*, 1 Com., 550; *Port v. Jackson*, 17 J., 239, 479; *Atkinson v. Coatsworth*, 8 Mad., 33; *Churchill v. Hunt*, 3 Den., 326; *Lathbridge v. Mytton*, 2 B. & A., 772; *Perry v. Foy*, 2 M. & R., 181; *Cady v. Allen*, 22 Barb., 388; *Chase v. Hinman*, 8 Wend., 452; *Thomas v. Allen*, 1 Hill, 145; *Holmes v. Rhodes*, 1 Bos. & Pull., 938; *Hodgson v. Bell*, 7 Term R., 97; *Touissant v. Martinnant*, 2 Term R., 100; *Martin v. Court*, 2 Term R., 640; *Saward v. Ansley*, 2 Bing., 519; *Wickes v. Heppock*, 6 Wal., 194, 199.) They were at least entitled to a judgment directing defendant to pay the assessment. (*Champion v. Brown*, 6 J. Ch., 406.) No amendment of complaint was necessary to award equitable relief. (Code, § 275; *Marquat v. Marquat*, 2 Ker., 336; *Jones v. Butler*, 30 Barb., 641.)

*S. F. Cowdrey* for the respondent. The court will not impose upon the lessee the hardship of paying the assessment to the lessor, leaving the leasehold premises still liable. (*Delavergne v. Norris*, 7 J., 358; *Prescott v. Trueman*, 4 Tyngs, 627.) The lessor must first pay the incumbrance, or he can only recover nominal damages. (Rawle on Cov., 154;

Opinion of the Commission, per LEONARD, C.

*Delavergne v. Norris*, 7 J. R., 358; *Stannard v. Eldridge*, 16 id., 254; *Van Slyck v. Kimbal*, 8 id., 198; *Sedg. on Dam.*, 848; *Gilbert v. Wiman*, 1 Comst., 563; *Cornell v. Prescott*, 2 Barb., 16; *Halsey v. Reed*, 9 Paige, 446; *Marsh v. Pike*, 10 id., 595; *Johnson v. Zink*, 52 Barb., 396; *Ferris v. Crawford*, 2 Denio, 595; *Russell v. Pistor*, 7 N. Y., 171; *Churchill v. Hunt*, 3 Den., 321; *Aberdeen v. Blackmar*, 6 Hill, 324; 1 Saund., 116; *Hodgson v. Ball*, 7 Term, 97; *Martin v. Court*, 2 Term, 640; *Saward v. Ansley*, 2 Bing., 519; 10 Moore, 55.) Actual compensation will only be made for actual loss. (*Sedg. on Dam.*, 811; *Aberdeen v. Blackmar*, 6 Hill, 324; *Jackson v. Port*, 17 J. R., 482.) This is an obligation to indemnify generally, and is only an obligation to indemnify against actual loss. (Note to 1 Saund., 116; *Martin v. Court*, 2 Term R., 640; *Saward v. Ansley*, 2 Bing., 519; 10 Moore, 55; *Port v. Jackson*, 17 J. R., 479; *Aberdeen v. Blackmar*, 6 Hill, 324; *Churchill v. Hunt*, 3 Denio, 321; *Dolph v. White*, 2 Kern., 304; *Chase v. Hinman*, 8 Wend., 452; *Webb v. Pond*, 19 id., 423; *Harmony v. Bingham*, 12 N. Y., 113; *Thomas v. Allen*, 1 Hill, 145; citing 1 Saund., 116 (note), *Holmes v. Rhodes*, *Hodgson v. Bell*, *Port v. Jackson*, and overruling *Douglass v. Clark*, 14 J. R., 177.)

LEONARD, C. The covenant of the defendant is affirmative and positive, not collateral or secondary, in its terms. He covenants to "bear, pay and discharge all taxes and assessments," etc., as an obligation or debt of his own, and the language conveys no idea that the plaintiffs are first to bear and pay, before the demand becomes obligatory upon the defendant for payment.

The covenant is broken when the defendant neglects to pay taxes or assessments duly imposed. The defendant is not at liberty to say that it is the debt of the plaintiffs; let them first pay it, and I will then pay them. It is his own debt, made so by the terms of his covenant.

The distinction between a covenant or promise whereby

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Opinion of the Commission, per LEONARD, C.

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the defendant makes the amount to be paid his own debt, and one simply of indemnity whereby the covenant or promise is not broken until the amount has been paid by the plaintiff, pervades all the cases upon this subject, from the case of *Jackson v. Port* (17 J. R., 479), when the rule became somewhat settled and defined, until that of *Gilbert v. Wiman* (1 N. Y. R., 550).

The former case has been repeatedly approved by the highest courts of this State. In the case of *Gilbert v. Wiman* (*supra*), it is said by Judge GARDINER, delivering the opinion of the court, that "the distinction is very important. \* \* \* It is the distinction between an affirmative covenant for a specific thing, and one of indemnity against damage by reason of the thing specified. The object of both may be to save the covenantee from damages, but their legal consequences to the parties are essentially different." The opinion further proceeds to illustrate how a bond or other instrument, designed for indemnity only, may, by its terms, create an immediate liability for the measure of damages to which the claim subjected the obligee, although not previously paid by him. The cases of *Thomas v. Allen* (1 Hill, 145) and *Churchill v. Hunt* (3 Denio, 321) are cited with approval.

The language of Justice BEARDSLEY, in the last mentioned case, that upon obligations of this sort the right of action becomes complete on the defendant's failure to do the particular thing he agreed to perform, is commended as an obvious truth. *Port v. Jackson* (*supra*) was an action upon a covenant by the defendant, as assignee of a lease executed to the plaintiff, that the defendant would perform, fulfill and keep all the covenants, conditions, provisos, payments and agreements mentioned in the lease on the part of the plaintiff to be paid, done or performed. One question discussed was whether the plaintiff should recover nominal damages only, or the amount of rent due, it being conceded that the plaintiff had not paid any part of the rent. Justice VAN NESS said, in the Supreme Court, p. 245, "My opinion is that the latter (the rent) is recoverable. The covenant is

not that the defendant shall indemnify the plaintiff against his own covenant in the lease, or against any damage which he may sustain, but it is express and positive."

Chancellor KENT said, in the same case, on appeal to the Court of Errors (17 J. R., 482): "Where a defendant has undertaken to do an act in discharge of the plaintiff from such a bond or covenant, he must show, specially, matter of performance; and this Jackson ought to have shown in this case. But where the defendant has undertaken to acquit and discharge the plaintiff from any damages, by reason of his bond or covenant, he then merely undertakes to indemnify and save harmless, and the plaintiff is then bound to show his damages. \* \* \* Port was not bound to pay the rent or have it recovered from him by due course of law, before he could resort to Jackson. He was not bound to submit himself to such previous distress or inconvenience. \* \* \* If Jackson suffers the rent to be previously collected from Port, that would surely not be keeping and performing Port's covenant, as he had engaged to do."

The rule may be definitely drawn from numerous cases, that where indemnity only is expressed, damages must be sustained before a recovery can be had; but a positive agreement to do an act which is to prevent damage to the plaintiff, will sustain an action where the defendant neglects or refuses to do such act. (*Jackson v. Port*, 17 J. R., 239, 479; *In the Matter of Negus*, 7 Wend. R., 501; *Chace v. Hinman*, 8 id., 453; *Mann v. Eckford's Ex'rs*, 15 id., 502, 514; *Webb v. Pond*, 19 id., 423; *Thomas v. Allen*, 1 Hill R., 145; *Aberdeen v. Blackmar*, 6 id., 324; *Churchill v. Hunt*, 3 Denio R., 321; *Gilbert v. Wiman*, 1 N. Y. R., 550; *Cady v. Allen*, 22 Barb. R., 388; *McGee v. Roen*, 4 Abb. P. R., 8; *Schott v. Schwartz*, MSS., Com. of Appeals, January, 1872; Sedgwick on Damages, 303-314, marg.)

I am aware that the author of the treatise on Damages, just referred to, attempts to undermine, while he concedes that the rule is as it has been here stated, and as it is repeated in several cases mentioned in the text or referred to by the sub-

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Opinion of the Commission, per LEONARD, C.

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joined notes. The author says it is somewhat in conflict with the important and fundamental rule that actual compensation will not be given for merely probable loss, and he further asserts that the argument, that the party must be held in the full amount because he has bound himself to do a particular act, is of no great weight.

In my humble opinion, the observation is not warranted. Parties have the just right to make all lawful contracts guarding their rights and securing the performance of their intentions, including that of contravening the rule of actual compensation for actual loss; and when expressed in apt and suitable language, it would be flagrant wrong if courts of justice should assume to disregard it, in favor of some technical rule framed for other and wholly different circumstances. I think it a sound and wholesome rule to construe a lawful contract according to its plainly expressed meaning, being governed also by the rules of construction which have been established by precedents.

It is urged by the counsel for the defendant that the covenant should be construed to be for indemnity merely, because neither the particular tax or assessment, nor the time of payment, nor the person or corporation to whom payable, are stated in the covenant of the defendant. The covenant appears to be specific and certain without these particulars. That is certain which is capable of being rendered certain. The covenant is to pay all such taxes and assessments as shall be imposed during the term mentioned in the lease. Before the action was brought, the assessments for certain sums had been imposed. Several years had elapsed, and the defendant had neglected to pay them, according to his covenant. I am unable to perceive that the objection referred to has been well taken.

The learned presiding justice of the New York Superior Court suggests, in his opinion, that the plaintiffs were not personally responsible for the assessment, and therefore that they will not necessarily be damnified by the non-payment; and he observes, *non constat*, that they may not prefer to

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Opinion of the Commission, per LEONARD, C.

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abandon the lands rather than pay the incumbrance, or, at all events, may not be damnified to the full amount of it. The presumption is rather violent. The premises were subject to a sale for the payment of the assessment, whereby they might be lost. Assessments, although often large, as in the present case, do not amount to a confiscation, and the premises are worth more than the tax or assessment. No evidence to the contrary appears. It is notorious that the premises were largely enhanced in value by the improvements for which the assessments were imposed, but evidence of that fact was not material, and the contrary or opposite conclusion ought not to be assumed as a fact. It was doubtless to guard against the contingency of a sale of the premises by the city corporation, to obtain payment of the sums assessed, that the covenant was inserted in the lease. The sale of the premises would involve a loss of the security for the rent reserved, and probably of the reversion. It is perhaps superfluous to discuss the question of the liability of the plaintiffs for the amount of the assessments, but I think a different rule from that suggested by the presiding justice has been held by the Court of Appeals. (*The Mayor v. Colgate*, 12 N. Y. R., 140.) The defendant in that case was held to be personally liable for the sum assessed as upon a judgment, although more than six years had run before the commencement of the action.

The hardship and risk attending the recovery of a judgment, without prepayment of the sum by the covenantee, has been commented upon. This objection is not substantial. The defendant can make the payment to the city authorities even after judgment, and a court of law is vested with such equitable power that, upon application after such payment, proceedings for the collection of the judgment, except as to the costs, would be stayed, and, upon payment of the costs, satisfaction of the judgment would be ordered.

The order of the General Term should be reversed, and the Superior Court be directed to adjust the amount due upon the assessment against the premises, and render judgment for

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Statement of case.

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the plaintiffs upon the verdict of the jury, with the costs of this appeal and of the action.

All concur.

Order reversed, and judgment in accordance with opinion.

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EDMUND J. POWERS, Appellant, v. JOHN SHEPARD, Respondent.

The control conferred upon congress, by the Constitution of the United States (art. 1, § 8), over the State militia, begins when they are mustered into the service of the United States. Arrangements by the States to procure or aid in calling them forth are not unauthorized, nor are regulations, fixing and limiting the amount of bounties, or rewards given to procure their services; therefore, section 4, of chapter 29, of the Laws of 1865, which prohibits the payment of any sums for the procurement of volunteers, save as provided for by that act, is not in conflict with the Constitution of the United States, and an agreement to pay a sum prohibited by that section is void.

The re-enactment of certain of the sections of one act, in a subsequent one providing for a different scheme, is not a repeal by implication of those sections in the first act, nor does a provision in the second act, suspending the operation of the similar sections in that act, have the effect to suspend the operation of those in the first act. The first seven sections, therefore, of said chapter 29, of the Laws of 1865, were not repealed or their operation suspended by chapter 41 of the Laws of that year.

Where several statutes *in pari materia* are passed by the same legislature, they are to be taken and construed together.

(Argued January 8, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, entered upon order setting aside a verdict in favor of plaintiff, and directing judgment in favor of defendant.

In March, 1865, the defendant was supervisor of the town of Sparta, in the county of Livingston, and, as such, for the purpose of filling the quota of that town, under the call for men for the army and navy of the United States, issued by the president on December 19, 1864, or the next call thereafter, he entered into an agreement in writing with the plaintiff, wherein he, the defendant, authorized the plaintiff to



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Statement of case.

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recruit and furnish for him, the defendant, and for his said town, seventeen three-years naval recruits, on the credit of the same duly made, for each of which, he, the defendant, agreed to pay the plaintiff the sum of eight hundred dollars.

On March 21, 1865, the defendant made a second agreement, which was indorsed upon the first, by which he agreed to pay the plaintiff for furnishing the seventeen recruits provided for in the first agreement, the additional sum of eight hundred and fifty dollars, besides the amount mentioned in the first agreement.

The plaintiff furnished the requisite number of men, between the 21st and 25th of March, and the defendant paid to him the sum agreed upon in the first agreement.

This action is brought to recover the additional sum of eight hundred and fifty dollars.

On this trial the defendant moved to dismiss the complaint, on the grounds that the plaintiff had shown no cause of action, that the contract upon which the action was brought was void and in violation of the laws of this State, and particularly of chapter twenty-nine of the Laws of 1865, and of the fourth section of that act.

This motion was denied and the defendant's counsel excepted.

The court thereupon ordered a verdict for the plaintiff, subject to the opinion of the court at General Term.

The case and exceptions were argued at General Term, and judgment was ordered for the defendant with costs, which judgment was accordingly entered.

*Ira D. Warren* for the appellant. Chapter 29 of the Laws of 1865 is in contravention of section 8 of article 1 of the Constitution of the United States. (*Houston v. Moore*, 5 Wheat., 23, 24; *Thompson v. Van Ingen*, 9 J., 564; *Powers v. Shepard*, 1 Abb. N. S., 129.) Where two acts are repugnant and contradictory, the last act is an implied repeal of the first. (*C. M. Co. v. Vanderpoel*, 4 Cow., 558; *Harrison v. Trustees of R.*, 10 Wend., 557; Sedgar on Stat. and

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Opinion of the Commission, per EARL, C.

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Const. Law, 124; *Dexter v. Limerick R. R. Co.*, 16 Barb., 15; *Davis v. Fairbanks*, 3 How. U. S. Rep., 636; *Bowen v. Lease*, 5 Hill, 225, and note a; *Commonwealth v. Kimball*, 21 Pick, 373; *Sterman v. State*, 21 Texas, 724; *Nixon v. Aift*, 16 La. An., 379; *De Pauw v. New Albany*, 22 Ind., 204; *Mullen v. The People*, 31 Ill., 444; *Williams v. Potter*, 2 Barb., 316.) A subsequent statute reversing the subject-matter of the first is a repeal of the first. (*Bartlett v. King*, 12 Mass., 537; *Nichols v. Squire*, 5 Pick., 168; *Henderson v. Sherburne*, 2 M. & W., 239; *Att'y-Gen'l v. Lockwood*, 9 M. & W. 391.) If the two acts can exist together the first seven sections of chapter 29 are suspended by section 11 of chapter 41. (Dwarris on Stat., 685, 700; *People v. Jackson*, 30 Cal., 427.) Chapter 56 of the Laws of 1865 is unconstitutional. (*Newell v. The People*, 8 Seld., 124.)

*S. F. Freeman* for the respondent. Chapter 29 of the Laws of 1865 is not unconstitutional. (*Cochrane v. Von Surloy*, 20 Wend., 381; *Newell v. The People*, 8 Seld., 109; *Wynehamer v. The People*, 3 Kern., 391; *The People v. Draper*, 3 N. Y., 549; *Leggett v. Hunter*, 19 id., 463; *Bank of Chenango v. Brown*, 26 id., 469.)

EARL, C. The agreement upon which the action was brought was personally binding upon the defendant, although he was, at the time he made it, supervisor of the town of Sparta. It is too clear for reasonable dispute, that although he was acting for the town, he intended to bind himself.

This agreement was made March 9, 1865, and it is conceded that it was prohibited by the language of section 4 of chapter 29 of the Laws of 1865. But it is claimed, on the part of the plaintiff, that that section is in conflict with the Constitution of the United States, and hence that it is void. The claim is that subdivisions 12, 13, 14, 15 and 17 of section 8, article 1 of that Constitution confer upon Congress the entire power to make the necessary laws for calling forth the

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Opinion of the Commission, per EARL, C.

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militia to suppress insurrection, and that Congress having exercised this power, the State has no right to intervene and legislate upon the same subject. But this act had nothing to do with the militia of the State nor with calling them forth. Its only object was to encourage volunteering and enlistments, so as to shield the citizens of the State from a draft, and at the same time aid the general government in putting down the rebellion.

The more important question, and the only one in reference to which there was any difference of opinion at General Term, is the one upon the claim of the plaintiff that section 4 was repealed or suspended by chapter 41 of the Laws of 1865.

Chapter 29 provided for a State bounty, not exceeding \$600, for men enlisting for three years, and also authorized cities, towns and counties, upon certain conditions therein named, to pay the same bounty, to be refunded subsequently by the State. Sections 8, 9 and 10 of the act provided for raising the money to pay the bounties by a State debt to be paid in eighteen years. By sections 11, 12 and 13, provisions were made for submitting the act to the people at the next general election; and section 14 provided that sections 1, 2, 3, 4, 5, 6, 7, 11, 12, 13 and 14 of the act should take effect immediately; but that sections 8, 9 and 10 should not become a law until ratified by the people. While by section 3 of this act the comptroller was authorized to borrow money to carry out the provisions of the act and to repay the money so borrowed from the money to be raised under sections 8, 9 and 10 no direct appropriation of money was made and no provision was made for the payment of the money borrowed in case the people failed to ratify. This act was passed February 10.

On the 24th of February, chapter 41 was passed, and it contains the first seven sections of chapter 29. Section 8 appropriates \$30,000,000 to pay the bounties authorized by the act. Section 9 provides for a tax to raise the money; and section 10 provides for borrowing the money until it can be

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Opinion of the Commission, per EARL, C.

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realized from the tax. Section 11 declares that the act should be a law from the time of its passage, but that it should not take effect until after the next general election.

Although the first seven sections of chapter 29 are contained in this chapter, I do not think that it was the intention of the legislature to repeal them or suspend their operation until chapter 41 should go into effect. It is hardly to be presumed that the legislature would have repealed an act passed but fourteen days before, and if they had intended to do so, they would probably have said so in some appropriate language, and would not have left it to mere inference.

The first act made no provision for paying the money borrowed, in case the people did not ratify sections 8, 9 and 10. And the object of the second act was to make provision, by taxation, to pay the money thus borrowed, in case the people failed to ratify, and, in that event, chapter 41 made complete provision for the whole case. But in case the people did ratify, then chapter 41 was not to take effect until after the adjournment of the legislature, so that it could be repealed, and the whole matter left, in that event, to chapter 29, which made full provision for it. Hence, there was no inconsistency in the two acts.

That there was no intention to repeal chapter 29, is made still more clear by chapter 56, of the Laws of 1865. As above stated, chapter 29 made no provisions for raising the money to pay the bounties, in case the act was not ratified by the people. Chapter 41 did not, in any event, take effect until after the canvass of the votes given at the next annual election. Hence, in order to make adequate provision for raising the money without delay, the act, chapter 56, was passed, which expressly recognized chapter 29 as in force, and was passed to supplement it. These three statutes are *in pari materia*, and must be construed together, and when thus construed in the light of the circumstances surrounding their enactment, and the objects intended to be reached, no doubt is left on my mind that section 4, of chapter 29, was in force when this contract was made.

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Statement of case.

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This conclusion is fortified by a still further reason : section 4, of chapter 29, was enacted and took effect February 10. Fourteen days afterward, chapter 41 was enacted, with a provision that no part of it should take effect until after the canvass of the votes at the next election. How, then, could the latter act, before it took effect, by implication or otherwise, repeal or suspend any part of chapter 29?

The judgment should, therefore, be affirmed with costs.

All concur ; LEONARD, C., not sitting.

Judgment affirmed.

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THE ONTARIO BANK, Respondent, v. JOHN D. HENNESSEY,  
impleaded, etc., Appellant.

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In forming a copartnership the parties can stipulate as between themselves that one partner shall be free from liability for loss, or that his liability be limited, and where one is to have a share of the profits of a business in consideration of his share of capital invested and imperiled therein, whatever may be the intent of the parties, this, as to third persons, makes him a partner.

Where, in a copartnership agreement between A. and B., no firm name is expressly adopted, but A. is to give his personal attention to and have entire control and management of the business, with authority to arrange and negotiate the acceptance of drafts, B. to incur no risks and to assume no responsibility, it is a fair inference that the copartnership business is to be done in the name of A., and B. is liable upon a draft drawn by A. in his individual name, procured to be discounted by him for the benefit of the firm, and avails applied to its use, although at the time the draft was discounted B. was not known to the payee as a partner. (GRAY, C., dissenting.)

(Argued January 8, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial district, affirming a judgment in favor of plaintiff entered upon a verdict, and also from an order denying a motion for a new trial.

The action was brought to recover the amount of a bill of

## Statement of case.

exchange drawn by Angus McDonald, one of the defendants, at Hamilton, Canada West, in his own name, on W. H. Newman, New York, to the order of plaintiff, for \$4,000 in gold, at thirty days. The name of defendant, John D. Hennessey, does not appear upon the draft. The action was defended by Hennessey. On the 28d March, 1864, the defendants entered into an agreement, of which the following is a copy:

Memorandum of an agreement made by and between Angus McDonald of the city of Brooklyn, party of the first part, and John D. Hennessey, carpenter, doing business at No. 141 Water street, in the city of New York, party of the second part, witnesseth:

That the said parties do hereby enter jointly in the business of getting white oak ship knees, white oak and pine timber, and black walnut in Canada, and bringing the same to market in the city of New York, during the season of navigation of the current year, and making sale and delivery of same at the Brooklyn navy yard or elsewhere, of which the conditions are as follows:

First. That the party of the first part shall personally superintend the purchase of said timber, etc., in Canada, attend the forwarding thereof to New York, and, if necessary, the delivery of same, and the collection of the payments therefor.

Second. That the party of the second part hereby agrees to furnish the sum of \$800, federal currency, toward the commencement and prosecution of said business, namely, \$400 to be paid into the hands of the party of the first part, on or before the 31st day of March instant, and the remaining \$400 to be likewise paid into the hands of the said party during the month of April next.

Third. It is fully understood and hereby agreed upon, that the said party of the second part hereby incurs no further risk, nor assumes any responsibility whatsoever, than the said sum of \$800 aforesaid. And that in consideration thereof, he the said party of the second part shall be paid one-fourth part

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Statement of case.

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of the net profits accruing from the said business, as his full and lawful share.

Fourth. That as soon as practicable after the sale and delivery of said timber, and the net proceeds thereof are ascertained, then the portion due and payable to the second party shall forthwith be paid him.

Fifth. That the party of the first part is hereby empowered to arrange and negotiate with such parties as may be necessary, to accept drafts and pay expenses on said timber, and give such party or parties security or lien on such timber, and even if necessary give an interest in the business in New York to such parties. But it is understood that such interest shall not interfere with the interest and share of the party of the second part.

It is furthermore agreed that the fourth article above named is intended to mean every lot or parcel of timber sold and delivered the proceeds thereof shall be paid over.

To the due fulfillment and observance of which the parties bind themselves, their heirs and assigns.

Done at New York this 23d day of March, 1864.

ANGUS McDONALD. [L. s.]

JOHN D. HENNESSEY. [L. s.]

McDonald went to Canada in pursuance of the agreement, gave the bill to the Ontario Bank and that bank discounted it for him. Its proceeds were paid by him for a cargo of oak timber, which was sent to New York under the arrangement with Hennessey. Counsel for Hennessey moved to dismiss the complaint as to him, which was denied and an exception taken.

The court thereupon directed a verdict for the plaintiff for the amount of the bill and interest, to which direction the defendant Hennessey excepted.

The jury rendered their verdict for the plaintiff for \$4,366.40.

The defendant moved for a new trial on the minutes of the court, which was denied.

Judgment was thereupon entered for the plaintiff upon the verdict.

## Statement of case

*Crook & Bergen* for the appellant. Only the parties to a draft can be sued in an action founded upon it. (*Allen v. Fosgate*, 11 How. P. R., 218; *De Rider v. Schermerhorn*, 10 Barb., 638; *Siffkin v. Walker*, 2 Camp., 308 per Lord ELLENBOROUGH; *Emly v. Lye*, 15 East., 10, 11; *Sylvester v. Smith*, 9 Mass. R., 121; *Barbour on Parties*, 117, 118, 120, 124; *Montgomery Co. Bank v. Albany City Bank*, 3 Seld., 459; *Brownell v. Winne*, 29 N. Y. R., 400; *Cookingham v. Lasher*, 38 Barb., 630; 1 Lord Raymond, 442; *Metcalf on Contracts*, 123 and cases cited; *Coll. on Partnership*, 264; *Ex parte Emly*, *Rose Bank Cases*, 61; *Cookingham v. Lasher*, 38 Barb., 630.) To make one a partner he must have an interest in the stock with the right of contract. (*Conklin v. Barton*, 43 Barb., 435; *Burckle v. Echart*, 1 Denio, 341, 442; *Metcalf on Contracts*, 117 and cases cited.) To constitute a partnership there must be a joint undertaking to share in the profits and loss. (*Pattison v. Blanchard*, 1 Seld., 186; *Post v. Kimberly*, 9 Johns., 470; *Conklin v. Barton*, 43 Barb., 435; *Merwin v. Playford*, 3 Robertson's Superior Ct. Rep., 702; *Mumford v. Nichol*, 20 John. R., 171; *Turner v. Bissell*, 14 Pick. R., 192, 196; *Story on Partnership* 69; *Rice v. Austin*, 17 Mass. R., 197, 206; *Loomis v. Marshal*, 12 Conn. R., 69; *Conklin v. Barton*, 43 Barb., 435; *Sampson v. Feltz*, 1 McCord Ch. R., 218; *Chase v. Barrett*, 4 Paige, 148; *Bostwick v. Champion*, 18 Wend., 175.) Where one receives a share of the profits of a business as a compensation for services or for loans, it is not a partnership. (*Burckle v. Echart*, 1 Denio, 341, 342, per BRONSON, Ch. J; *Vanderburgh v. Hull*, etc., 20 Wend., 70; *Ross v. Drinker*, 2 Hall's N. Y. Sup. C. R., 415; *Miller v. Bartlett*, 15 Sergt. & Rawle., 137; *Murray v. Whitney*, 10 Johns., 226; *Rice v. Austin*, 17 Mass. R., 197.) Where there is a stipulation that A. shall appear as a partner, but shall be liable to no loss, he is not liable to those having knowledge of the stipulation. (*Alderson v. Clay*, 1 Camp., 404; *Minuet v. Winney*, 1 Bro. P. Cas., 489; *Ensign v. Wands*, 1 John. Cas., 171; *Livingston v. Rosevelt*, 4 John. R., 251; *Grom v. Cadwell*, 5 Cow., 489;



## Statement of case.

*Boardman v. Gore*, 15 Mass. R., 331; *Bailey v. Clark*, 6 Pick. R., 372; Coll. on Part., 56; Story on Part., 65, 69; id., 255, 3 Kent Com. 7th ed., 25, note a; 10 East., 264.) This was not a loan to a partnership, but a discount of McDonald's individual draft. (See *Emly v. Lye*, 15 East., 10, 11; Doug., 654 note; *Ex parte Shuttleworth*, 3 Ves., Jr., 368; *Ex parte Blackburn*, 10 Ves., Jr., 204; 1 Lord Ray, 442; *U. S. v. Astly et al.*, 3 Wash. C. C. R., 508; 9 John. R., 310; *National Bank v. Ingraham*, 58 Barb., 290.) Where one partner borrows and gives his own paper it does not become a partnership debt by being applied to partnership purposes. (*Bevan v. Lewis*, 1 Sim. R., 376; *Siffkin v. Walker*, 2 Camp., 308; *Emly v. Lye*, 15 East. R., 10, 11; *Loyd v. Freshfield*, 2 Car. & Payne, 325; *Van Reimsdyke v. Kane*, 1 Gall. R., 630; *Riply v. Kingsbury*, 1 Day's R., 150; *Wiggins v. Hammond*, 1 Mo. R., 121; *Breckinridge v. Schreeve*, 4 Dana R., 378; Coll. on Part., 214; 3 Kent, Com., 7th ed., 43; *Lickie v. Scott et al.*, 10 La. R., 416; *Talmadge v. Penoyer*, 35 Barb., 120; *Turner v. Jaycot*, 40 N. Y. [1 Hand], 471; *Jaques v. Marquand*, 6 Cow., 497; *Wittaker v. Brown*, 16 Wend., 505; *Thorn v. Smith*, 21 Wend., 365; *Joyce v. Williams*, 14 Wend., 141; *U. S. Bank v. Winship*, 5 Peters, 574; *Leroy v. Johnson*, 1 Peters, 186.) Where one of the parties is unknown and the loan is made on the credit of the others, the transaction only binds the latter. (*Miller v. Manice*, 6 Hill, 114; *Irving v. Conkling*, 36 Barb., 64.)

*Starr & Ruggles* for the respondent. The contract between the defendants was a contract of partnership. (Collyer on Part., §§ 10-40 *et seq.*; Story on id., §§ 33-34 *et seq.*; *Grace v. Smith*, 2 W. Black., 998-1000; *Winship v. Bank U. S.*, 5 Peters, 457; *Ex parte Hamper*, 17 Vesey, 404; *Chase v. Barrett*, 4 Paige, 148; *Dobb v. Halsey*, 16 Johns., 40; *Champion v. Bostwick*, 18 Wend., 175; Collyer on Part., 38; cases above cited.) The draft was drawn to obtain money for the partnership and proceeds expended for its benefit; this made the draft a partnership obligation. (*Winship v. Bk.*,

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Opinion of the Commission, per LEONARD, C.

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*supra*; *Davis v. Allen*, 3 N. Y., 171.) That the plaintiff may have been ignorant of Hennessey's interest, does not affect the question of liability. (Story on Part. §§ 80, 138, 139; Collyer, id., § 537; *Kelley v. Hurlbut*, 5 Cow., 535.)

LEONARD, C. The agreement between the defendants, of March 23d, 1864, constituted a copartnership. There was a community of profit and loss. The limitation of the extent of the loss to be borne by Hennessey to the sum of \$800, holds good against his partner McDonald, but it no more limits his liability on partnership contracts, as to third parties, than does the limitation of his interest in the profits of the business to twenty-five per cent. (Collyer on Part., §§ 16, 17, 18.) Many cases might be cited, including those referred to by the counsel for defendant, but they leave the rule as stated invulnerable. Nor does the fact that the defendant Hennessey was not known to the plaintiff as a partner affect his liability.

So far as it appears from the evidence, no one was known to the plaintiff as a contracting party, but the defendant McDonald. The copartnership and its business had the benefit of the money of the plaintiff. Although the fact does not appear to have been disclosed to plaintiff, the discount was obtained for and applied to the use of the copartnership, and the articles authorized McDonald to contract just such a liability for the business. He was "authorized to negotiate and arrange with parties to accept drafts and pay expenses," and give security on the timber. This language clearly contemplates that drafts were to be drawn by McDonald, who was to assume the management of the business. I think, in contemplation of law, he acted under and pursuant to this authority, when he applied for and obtained the discount of his bill on Newman, and in applying its proceeds to the business of the partnership. He made no declaration that he applied for the discount on his private account, and the use made by him of the proceeds indicates that it was not so in fact. It was not necessary

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Opinion of the Commission, per LEONARD, C.

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that the bank should know, at the time of the discount, that the money was obtained for copartnership use, in order to bind both of the defendants for its repayment. (Collyer on Part., § 537.)

The rule appears to be that the firm are liable when one member borrows, not expressly on his individual credit, and it is shown that the money was borrowed for and appropriated to the use of the firm. (*Church v. Sparrow*, 5 Wend. R., 223.)

It did not appear that McDonald was engaged in any other business on his own account, and this was considered as an important fact in an analogous case. (*Bank of Rochester v. Monteath*, 1 Denio R., 402, 405.)

Certain cases were relied on and cited in the opinion of the learned judge below, who dissented from the majority of the court, which are not in fact analogous, in the view which I have taken of the facts of this case. In *Jacques v. Marquand* (5 Cow., 497), it is said that where one partner borrows money on his individual credit and afterward applies it to the use of the firm, the lender does not thereby become a creditor of the firm. That case differs from the present, in the fact that Marquand did not act on behalf of his firm (p. 501), and Marquand was there seeking to charge his firm, and to defeat an action brought to charge him individually. The case of *Tallmadge v. Penoyer* (35 Barb., 120) was also referred to in the dissenting opinion. It was there held that money borrowed for the individual use of one, and afterward used for the firm of which he was a member, without his partner's consent, did not make the partner liable. The fault in the case of the defendant Hennessey is that his partner was acting for the partnership, and by his authority. This fact distinguishes this case from those authorities which have been relied on by the counsel for the appellant. For these reasons I am of the opinion that it was well held by the majority of the court below that the bill was drawn by the firm, although the name of McDonald only appeared.

It must be conceded that the agreement contemplates that

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Opinion of the Commission, per EARL, C.

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no liability shall be created to bind Hennessy beyond the sum which he had contributed as capital, but it has not been framed so as to secure that result, except as between the parties. The right to a share of the profits as such, and not as a measure of compensation equal to the share stipulated for, overrides a construction of the agreement as to third parties which would produce such a result as the agreement is supposed to have contemplated.

It may be objected that the question whether McDonald was acting for himself individually in obtaining the discount ought to have been submitted to the jury. I think, however, the objection would have been untenable, as the facts indicate conclusively that he was acting in the interest of himself and Hennessy jointly. But if I am not right in this, the right to claim a new trial on this ground has been lost by the omission to request the judge at the trial to submit that or any other question to the jury.

In my opinion, the plaintiff was authorized to recover against both the defendants as for money had and received, without any reference to their liability as the drawers of the bill. The complaint contains the requisite allegations that the money was received and applied to the copartnership business of the defendants, and the proof sustains the allegations. (*Penta v. Stanton*, 10 Wend., 271, 278; *Allen v. Coit*, 6 Hill, 318.) The money of the plaintiff's bank was obtained by a party authorized by the partnership for that purpose to act in his own name, and it was applied legitimately in their business. The judgment is right and should be affirmed, with costs.

EARL, C. The agreement executed by the defendants, March 23, 1864, made them partners. It provides for a joint business, to which McDonald was to give his personal attention, and Hennessy was to furnish \$800. This \$800 was not a loan, but was to be furnished as capital, as no provision is made for its repayment. Hennessy, however, was to incur no further risk nor assume any further responsibility than the

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Opinion of the Commission, per EARL, C.

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\$800. This was placed in peril and might be lost, and if the loss should be greater than the \$800, McDonald was, as between him and Hennessy, to bear it. If there was any net profit, Hennessy was to have one-quarter of it. It thus appears that Hennessy was to share in the profits of the business as profits, not as a compensation for wages he was to earn, or interest on money loaned to McDonald, but in consideration of his share of capital invested and imperiled in the joint business. Whatever the intention of the parties may have been, this, as to third persons, made him a partner. Here, within the meaning of the authorities, was a communion of profits, and hence a partnership. (Collyer on Part., § 18; Lindley on Part., 17; *Winship v. Bank of the United States*, 5 Peters, 529, 560; *Champion v. Bostwick*, 18 Wend., 175.) It matters not that McDonald was to assume all the risk and bear all the loss beyond the \$800. "A man, on entering a partnership, may stipulate to be free from all liability for loss, and such stipulation will hold good as between himself and his co-contractor. In such case he will still be a partner, enjoying, in addition to the advantages of partnership, the indemnity offered him by his companion." (Collyer on Part., § 18.)

But here was also a community of loss. Hennessy's \$800 was put in peril, and to that extent he was liable to be involved in loss with his copartner. Hence, even if it were necessary, which is denied (*Manhattan Brass & Man. Co. v. Sears*, 45 N. Y., 797), that there should be a community of loss as well as of profit to constitute a partnership, that condition exists here. Hence I have no hesitation in holding that the defendants were partners, as between themselves, and for a much stronger reason as to third parties.

The next question is, whether Hennessy is liable upon the draft in suit. The agreement did not provide for a partnership name. But as McDonald alone was to give personal attention to the business, and as Hennessy was to incur no risk and assume no responsibility, no firm name being expressly adopted in the agreement, it is fair to infer that the firm business was

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Dissenting opinion, per GRAY, C.

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to be done in the name of McDonald. He was authorized to draw the drafts, to raise money for the business. Hence, McDonald's name was to all intents the firm name, and drafts drawn in that name to raise money for the use of the firm must bind the firm. (*Winship v. Bank of United States* [*supra*]; Story on Part., § 139.)

This draft was drawn and the money all used in the firm business, and hence both members of the firm were bound by it, as if they had both signed it.

While the complaint is technically defective in not directly alleging that the draft was drawn in the firm name, or that it was the draft of the firm, yet taking the whole complaint, together with the fact that both partners are joined as defendants, there is enough to show that the cause of action set forth is based upon the draft, as a firm draft, and that the liability sought to be enforced is the firm liability on the draft. As no objection was taken to the complaint by demurrer, and the defendants could not have been misled, the complaint should, at this stage of the case, be held sufficient in substance.

The judgment should be affirmed with costs.

GRAY, C. (dissenting). My examination of this case has brought me to the conclusion that the plaintiff ought not to recover against the defendant Hennessy. I agree that if, by any act of his, he had suffered himself to be held out to the plaintiff, or the public, as a partner with McDonald, in the enterprise of getting out and purchasing lumber in Canada to be marketed in Brooklyn or elsewhere, or if, by the contract between them, he was to share in the profits of the enterprise, and no limitation was made as to losses, or restriction as to the right of McDonald to expose him to loss by involving him in liabilities, he would be liable to share in all losses sustained by McDonald. The case is without evidence to support a recovery upon either ground stated; and I do not understand that the right to recover is placed upon either of them, but upon an agreement between the defendants, which, so far as the evidence shows, was never made public

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Dissenting opinion, per GRAY, C.

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or known only to themselves. The plaintiff's status is, therefore, no better (if it is as good) than it would have been if it had appeared on the trial that, at the time of the discount of the draft, the agreement was produced and read by the plaintiff, who was thereby notified of the rights of the parties as between themselves, and from it have learned that near the close of March, 1864, the parties jointly engaged themselves in the business of getting ship knees and other timber in Canada during the navigation season of that year, and making sale of it at Brooklyn navy yard or elsewhere. That McDonald was to give his personal attention to the business, and to enable him to commence and prosecute it. Hennessy was to and did furnish to him the sum of \$800, in consideration of which Hennessy was to receive one-fourth of the net profits of the enterprise, and, to enable McDonald to provide himself with further means with which to prosecute the business, he was authorized to arrange with other parties to accept drafts, and give, as security therefor, a lien on the lumber or an interest in the business; but to guard Hennessy against the hazard of further loss than that incurred by risking the \$800 advanced by him to the chance of loss, it was expressly provided that he should not incur a further risk than the loss of the advance thus made, or assume any responsibility whatever. This instrument, therefore, as between the parties to it, did not confer upon McDonald the right to involve Hennessy in any risk beyond the \$800, or place him in a condition where he would be compelled to assume any liability whatever, and, as a necessary consequence, a party who should discount McDonald's draft upon Hennessy, whether in ignorance of an agreement creating joint or partnership relation between them, or with notice that Hennessy's risk was thus limited, and that McDonald was not authorized to place him in a condition compelling him to assume a liability, could not compel him to honor or pay the draft.

For affirmance, LEONARD, EARL and HUNT, CC.

For reversal, GRAY, C.; LOTT, Ch. C., not sitting.

Judgment affirmed.

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Statement of case.

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ERASTUS N. HAMILL, Appellant, v. WILLIAM M. GILLESPIE,  
Respondent.

An announcement made upon an auction sale of personal property, that it is sold subject to a chattel mortgage and that the purchaser will have to comply with the conditions thereof, does not impose a personal obligation upon a purchaser who hears and assents to the announcement, and an action cannot be maintained against him to recover the amount secured by the mortgage.

While personal property covered by a mortgage remains in the possession of the mortgagor and its conditions are unbroken, the mortgagor's interest is subject to levy and sale upon execution, and the purchaser obtains the same title as that of which the mortgagor was possessed. This interest he can lawfully sell, and no claim arises against him in favor of the mortgagor, from the fact that he attempts to sell or does sell a clear title. There is no wrong done the mortgagor thereby, as he may still pursue his lien under the mortgage and his rights remain the same. In an action, therefore, by the mortgagor against the purchaser, it is not error to exclude evidence of such a sale.

(Argued January 8, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court of the fifth judicial district, entered upon an order denying motion for new trial and directing judgment in favor of defendant.

The action was brought to recover the sum of \$66.13 secured by a chattel mortgage in the usual form, made by one John Markle upon his undivided one-half interest in nine acres of wheat and fourteen acres of oats, growing on the land of Oliver Glass, at the date of the mortgage, May 3d, 1866, which interest was levied on and sold on the 30th of June following, under a judgment and execution in favor of defendant against said Markle, defendant having become the purchaser of said interest at such sale. The constable, on putting up the property, with the consent of the defendant, and in his presence and hearing, announced to the bidders that the wheat and oats would be sold subject to said mortgage, and that the purchaser would have to comply with the condi-



## Statement of case.

tions and demands of the mortgage. The defendant harvested the wheat and oats and threshed them. The grain was of the value of over \$100. The plaintiff then offered to prove that the defendant sold the interest of Markle in said wheat and oats for a sum more than sufficient to pay the amount of the said mortgage, and received the money therefor, and that the plaintiff demanded of the defendant payment of his mortgage, after it became due, and that the defendant refused to pay it.

The counsel for the defendant objected to the evidence as irrelevant and immaterial, and the court sustained the objection. The case was here rested for the plaintiff. The counsel for the defendant moved to dismiss the complaint on the ground that the facts proven showed no cause of action. The counsel for the plaintiff claimed that the case should be submitted to the jury. The court thereupon dismissed the complaint. The counsel for the plaintiff duly excepted to each of the said rulings.

The court ordered the exceptions to be heard at the General Term in the first instance.

*William Porter* for the appellant. Defendant, having purchased the wheat and oats on the condition and in consideration of paying the money secured by plaintiff's mortgage, became liable therefor. (*Cleveland v. Farley*, 9 Cow, 639; 8 John., 29; *id.*, 379; 10 J. R., 412; 12 N. Y. R., 74; 9 Paige, 446; 1 J. R., 189; 17 *id.*, 239, 479; 2 Sand. Ch. R., 259; 3 Keyes, 525; 4 Hand, 399.) The act of the constable was not contrary to statute or public policy, and was not void. (*Alger v. Miller*, 56 Barb., 227.) Defendant is estopped from alleging the invalidity of his promise. (*Root v. Wagner*, 30 N. Y., 9; *Welland Canal Co. v. Hathaway*, 8 Wend., 483; *Dezell v. Odell*, 3 Hill, 225.) The mortgagor had no leviable interest in the property. (*Gordon v. Haspen*, 7 Tenn., 8; *Mattison v. Baucus*, 1 Comst., 295; *Hull v. Cowley*, 1 Kern., 505, per COWEN; *Otis v. Wood*, 3 Wend., 500; *Chadwick v. Lamb*, 29 Barb., 518; *Farrel v. Hildredth*, 38

Opinion of the Commission, per LEONARD, C.

Barb., 178; *Hull v. Sampson*, 18 How. P. R., 481; *Hull v. Sampson*, 35 N. Y., 274, per PORTER; *Bailey v. Benton*, 8 Wend., 348, per JEWETT, C. J.; *Ruckhow v. Schenck*, 4 Hand, 451; *Rish v. Milk*, 20 Barb., 616; *Balcom v. Clark and others*, cited in *Chadwick v. Lamb*; *Farrel v. Hildredth*, 38 Barb., 178, per WELLS, J.) Neither Markle nor one holding under his title, with knowledge of the mortgage, could sell the property absolutely, without liability to the mortgagor as for a conversion. (*Fenn v. Bettison*, 8 Eng. L. & E., 485; *Gould v. Asseler*, 22 N. Y., 234.) It was competent to waive the tort and adopt *assumpsit*. (*Easton v. Clark*, 35 N. Y., 225, 234; *Cummings v. Vorce*, 1 Hill, 282; *Roth v. Palmer*, 27 Barb., 655; *Betts v. Collins*, 13 Wend., 154, per MASON, Senator; *Hill v. Davis*, 3 N. H. R., 384; *Stockill v. Watkins*, 2 Gill & John., 236, 342, 343; *Foster v. Stewart*, 3 Maule & Seller, 191; *Hinds v. Tredwell*, 7 How. P. R., 238; *Young v. Marshall*, 8 Bing., 43; *Berley v. Taylor*, 5 Hill, 577; *Allen v. Brown*, 5 Hand., 228.)

*William J. Wallace* for the respondent. The mortgagor had a leviable interest. (*Hall v. Sampson*, 35 N. Y., 274.) Plaintiff's remedy was to follow the property. (*Hall v. Carsely*, 17 N. Y., 202; 1 Kern., 501.) The testimony as to defendant's sale of the property was properly excluded. (*Hathaway v. Braneau*, 42 N. Y., 322.) There was no consideration for an agreement to pay the mortgage. (*Converse v. Kellogg*, 7 Barb., 590; 1 Par. on Con., 357, 363.) Defendant had a right to sell. (*Hall v. Hathaway*, 35 N. Y., 274.)

LEONARD, C. There was no express agreement proven, that the defendant would assume the payment of the chattel mortgage, held by the plaintiff, and no facts from which such an agreement can or ought to be implied, although we assume that the constable was authorized to announce that the property was sold, subject to the mortgage, and that the purchaser would have to comply with its conditions.

If a deed of real estate be accepted, containing a declaration

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Opinion of the Commission, per LEONARD, C.

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that the premises are conveyed, subject to a mortgage which the purchaser assumes to pay as a part of the purchase price, it has been held that the purchaser becomes thereby bound, not only to the vendor, but to the mortgagee, for the payment of the mortgage debt. But the mere fact of a conveyance of land, subject to an outstanding mortgage, creates no personal liability on the part of the purchaser to pay the mortgage.

The announcement of the constable, although made with the consent of the purchaser, or in his presence and hearing, was a declaration, only, that the property to be sold was subject to a mortgage to the plaintiff, and the purchaser would have to comply with its conditions. It was a notice that he did not sell a clear title; that the mortgage was a lien, and the purchaser must comply with its conditions. The alternative of not complying might be a loss of the property. Relief could be obtained from this condition, by payment, but it remained at the election of the purchaser to do so or not. He came under no contract of any nature whatever, by consenting to or hearing such an announcement.

At the time of the levy, the wheat and oats were in the possession of the mortgagor, and no breach of the condition of the mortgage had occurred, and the plaintiff did not then, or at any subsequent time, avail himself of the provision authorizing him to take possession, in case he deemed himself insecure. No attempt has been made, either by the complaint or the evidence, to charge the defendant on the ground that he had induced the plaintiff to neglect or omit to avail himself of this condition.

While the property remained in the possession of the mortgagor and the condition of the mortgage unbroken, he had an interest subject to his control and disposition. He could sell and deliver such title as remained to him. The purchaser would take it in case of a sale subject to the lien of the mortgage, whether its existence was ascertained by the purchaser or not, or whether the mortgagor mentioned or omitted to mention it. It follows of course that the interest of the mortgagor was equally subject to levy and

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Opinion of the Commission, per LEONARD, C.

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sale by an execution creditor, and the purchaser would obtain at such sale the same title as that of which the mortgagor was possessed and no more, no less. (*Hall v. Sampson*, 35 N. Y., 274; *Hathaway v. Brayman*, 42 N. Y., 322, and other authorities cited in the opinions in those cases.) There is no occasion for discussing the power or authority of the constable to make the announcement at the sale which he did, or the effect of it. It might well be held that the defendant, having consented to the announcement, would be estopped from disputing the force or effect of it, in case the mortgagee had been thereby induced to omit to take possession under this insecurity clause of his mortgage. But there is no evidence tending to prove that the plaintiff did anything or omitted to do anything by reason of such announcement, although he was present at the sale; no evidence was offered to prove that the announcement influenced the action of the plaintiff; nor was any request made specifically to submit to the jury any question on this subject, arising from an inference as to the effect the announcement might be presumed to have had upon the action of the plaintiff. The general request that the whole case should be submitted to the jury was not sufficient to raise the question here as to the presumption, nor as to any supposed error in not submitting it.

It was not material to inquire how much the defendant obtained for the wheat and oats. He bought only the interest of Markle, whatever that might be, subject to the mortgage. He could lawfully sell that interest again. Whether he received much or little for it is of no consequence to the plaintiff. If he sold the whole title he might be liable to the purchaser, in case the grain should be afterward taken from him under the mortgage; but that would be a question in which the plaintiff would have no concern.

No claim arises in his favor, on the ground that the defendant attempted to sell, or did sell in fact, a clear title to the grain. There was no wrong done thereby to the plaintiff; his rights are still the same. He might still pursue his lien

## Statement of case.

under the mortgage, or his debtor under his covenant therein. It was no error to exclude evidence of such a sale. For these reasons there was no conversion by the defendant and no tort to be waived by the plaintiff for which he might claim an implied assumpsit for the amount of his mortgage.

There being neither evidence of an express agreement to assume or pay the debt due to the plaintiff, nor evidence from which such an agreement on the part of the defendant might be implied; nor any evidence of the conversion of the grain by the defendant as against the plaintiff, so as to give him any right to waive a tort, and insist that a promise to pay for the grain be implied, the case for the plaintiff wholly fails, and the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

ALMIRA J. BASSELL, Respondent, v. SELAH P. ELMORE.  
Appellant.

The complaint in an action of slander, where the words charged are not actionable *per se*, must allege special damage. A general allegation that the slanderous charge injured the plaintiff in her good name, and caused her relatives and friends to slight and shun her, is insufficient.

Under a single count in an action of slander, plaintiff may prove a repetition of the same slanderous charge, for the purpose of showing the degree of malice, and thus enhancing the damage. So, also, when the words charged are not actionable *per se*, but the plaintiff has alleged and proven special damage, she may show a repetition of the charge, although not spoken in the presence or brought to the knowledge of the one through whose action plaintiff sustained the special damage.

The doctrine that an action of slander for words not actionable *per se*, cannot be maintained unless spoken in the presence, or brought directly to the knowledge of, the one who acted upon them, to the pecuniary injury of plaintiff, as laid down in *Keenholts v. Becker* (3 Denio, 846), questioned. (LEONARD, C.)

Plaintiff charged the paternity of her bastard child upon defendant's son. Held, that the fact that defendant was engaged in an attempt to settle the matter between plaintiff and his son did not authorize him to blacken her character; and a charge made by him, while so engaged, that she was a public prostitute, was not a privileged communication.

(Argued January 9, 1872; decided May term, 1872.)

SICKELS—VOL. III.

	48	561
	144	150
	48	561
j	155	234
	48	561
	162	18

## Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial district, affirming a judgment in favor of plaintiff entered upon a verdict.

This is an action of slander. The complaint contains two counts, in each of which it is alleged that the defendant, in 1862, charged the plaintiff with being a public prostitute, and with having had illicit intercourse with divers men. The only allegation of damage in the second count is that the slanderous statement greatly injured the plaintiff in her good name, and caused her relatives and friends to slight and shun her.

The answer alleges that in July, 1862, the plaintiff had a bastard child, which she charged upon defendant's son, claiming also that he should marry her; and that the alleged slanderous words were spoken in reference to the said charge against his son, and in negotiations for the settlement of the same, and in reference to the marriage of his son with the plaintiff, under such circumstances as would make what he said, privileged communications.

Upon the trial it appeared that the plaintiff had a bastard child, in July, 1862, and charged its paternity upon defendant's son, and that she and her friends desired and claimed that he should marry her. It was proved that the defendant uttered the slanderous words charged to one Madison Elmore, his brother, and also to his brother-in-law, Rodney Hill. The latter stood *in loco parentis* to the plaintiff, and testified that in consequence of the slanderous words charged he turned the plaintiff away from his house, and refused her a home in his family, where she had been residing as an adopted daughter from her infancy. Certain exceptions were taken during the trial, and other facts appeared, which sufficiently appear in the opinions.

*G. N. Kennedy* for the appellant. The second count in the complaint was defective in not alleging special damage, the words not being actionable *per se*. (1 Chitty's Pleadings, 386; *Tobias v. Howland*, 4 Wend., 537; *Beach v. Ranney*,

Opinion of the Commission, per EARL, C.

2 Hill, 309.) There being, then, but one count, but one slanderous charge could be proved. (*Root v. Lowndes*, 6 Hill, 518; *Keenholtz v. Becker*, 3 Den., 346.) The special damage must be shown to be the natural and immediate consequence of speaking the words. (*Beach v. Ranney*, 2 Hill, 309; *Keenholtz v. Becker*, 3 Den., 346.) The words were privileged. (*Van Wyck v. Aspinwall*, 17 N. Y., 190; *Harrison v. Bush*, 32 Eng. L. & E., 173; *Armsby v. Douglass*, 37 N. Y., 479.)

*D. Pratt* for the respondent. A repetition of the same slanderous words may be proved to show malice. *Fry v. Bennett*, 28 N. Y., 324; *Fowler v. Bowen*, 30 id., 20; *Titus v. Sumner*, 44 id., 266; *Howard v. Seaton*, 4 Com., 157; *Johnson v. Bowen*, 57 Barb., 118; *Jarvis v. Hathaway*, 3 J., 181.) Sufficient special damage was shown. (*Williams v. Hill*, 19 Wend., 305; *Olmsted v. Miller*, 1 Wend., 556.) The charge was not privileged. (*Gilbert v. People*, 1 Denio, 44; *Burlingame v. Burlingame*, 25 Wend., 448; *Lathrop v. Hyde*, 25 id., 448; *Thorn v. Moser*, 1 Den., 488.)

EARL, C. The defendant received hard measure of justice at the hands of the jury, but for this he has no remedy here. We can review only errors of law, and of these the defendant claims there were several at the trial.

The second count in the complaint was undoubtedly defective, because it did not allege any special damage which has been recognized as sufficient in law to uphold an action like this. It simply alleged that the slanderous charge injured plaintiff in her good name, and caused her relatives and friends to slight and shun her, to her damage \$2,000. (*Beach v. Ranney*, 2 Hill., 309; *Terwilliger v. Wands*, 17 N. Y., 54; *Wilson v. Goit*, 17 N. Y., 442.) There was, then, but one good count in the complaint, and the defendant's counsel objected on the trial that the plaintiff could therefore prove but one utterance of the slanderous charge. The objection was not well taken. It is now well settled that,

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Opinion of the Commission, per EARL, C.

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under a single count in the complaint, the plaintiff may show a repetition of the same slanderous charge even down to the trial, not for the purpose of sustaining the action, but for the purpose of showing the degree of malice, and thus enhancing the damage which the jury is authorized to award the plaintiff. (*Johnson v. Brown*, 57 Barb., 118; *Thorn v. Knapp*, 42 N. Y., 474; *Titus v. Sumner*, 44 id., 266.)

Ordinarily, the repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and, therefore, generally the loss resulting from such repetition, does not constitute special damage, and is not attributable to the first publisher. This rule results from the principle that every one who repeats a slander is responsible for the damage caused by such repetition, and such damage is not the proximate and natural consequence of the first publication of the slander. But if the slander be repeated under such circumstances as to be justifiable and innocent, and not to give a cause of action against the one repeating the same, then the first publisher thereof is generally responsible for the damage caused by such repetition. (*Terwilliger v. Wands*, 17 N. Y., 54; *Fowles v. Bowen*, 30 id., 20; *Ward v. Weeks*, 7 Bing., 211.)

These rules were not violated on the trial of this action. Madison Elmore was permitted to testify that the slanderous charge was uttered to him by the defendant. After the close of plaintiff's case, defendant's counsel moved to strike out this evidence on the ground that the charge was made in the absence of Hill, who stood in *loco parentis* to the plaintiff, and, hence, that no special damage could have resulted from it. The court denied the motion on the ground that the evidence was proper on the question of malice. I think the ruling of the court was correct. The evidence was not competent to sustain the action. But this was an action in which punitive damages could be given, and, hence, with the view of enabling the jury to measure out the proper punishment due to the defendant, it was competent for the plain-



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Opinion of the Commission, per LEONARD, C.

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tiff to show the degree of malice by which he was actuated; and, hence, within the cases above cited, it was competent to show a repetition of the same slanderous charge. It was peculiarly competent to give this evidence, as the defendant claimed on the trial that he uttered the defamatory words under such circumstances as made them privileged communications, and the publication justifiable and innocent.

The special damage alleged and proved was sufficient to sustain the action. The plaintiff had for many years lived with her uncle, Mr. Hill, as a member of his family. In consequence of this charge, she was refused permission to remain in his family, and was obliged to seek a home elsewhere. Thus special damage was shown within any of the decisions upon the subject.

It is further claimed, on the part of the defendant, that the conversations in which the charge was made were privileged. The defendant in his conversation with plaintiff's uncle, Hill, made the charge and said he could prove it, and that he was anxious to prove it. He professed to speak of something of which he had positive knowledge. He was not searching for information; he was not engaged in advising his son upon the subject of his difficulty with the plaintiff, nor in advising Hill of his duty to the plaintiff. Even if he was engaged in an attempt to settle the matter between plaintiff and his son, he was not privileged, within any case which has come to my attention, to blacken her character in such emphatic terms.

Having thus examined all the errors alleged, I reach the conclusion that the judgment should be affirmed, with costs.

LEONARD, C. The first count of the complaint only is good. The words are not actionable *per se*, and can be made so only on account of special damage having been sustained thereby, which must be suitably stated in the complaint. The second count is wanting or defective in this particular. Hence the defendant is correct in his position that evidence not material to support the first count was inadmissible.

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Opinion of the Commission, per LEONARD, C.

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The first witness detailed several conversations with the defendant, in which he made use of observations reflecting upon the chastity of the plaintiff, but not in the words charged by the first count. The counsel for the plaintiff called for other conversations with the defendant. Counsel for the defendant objecting at this point that no evidence could be given under the second count, the court held that the plaintiff should not be confined to proof of the conversation on that occasion, and that she might prove other conversations charging her with being a public prostitute. The judge said, also, that he overruled the objection that the plaintiff could not give evidence under both counts. The defendant excepted.

The question in regard to giving evidence under both counts was not legitimately before the court, and the judge ought to have refused to pass upon it. There was no evidence at that time offered not applicable to the first count. In fact, the evidence which had been given was not material to any count, unless it might be received as tending to prove the animus of the defendant; and in that aspect it was equally applicable to the first count as to the second. The ruling in regard to the right to give evidence under the second count was an error, but as the question was not before the court at the time, the ruling and exception were merely speculative, having nothing to do with the case, and the error cannot, for that reason, produce any result here. The plaintiff could not be shut out from proving the material allegations of his complaint, because evidence had been given of some charges of the defendant which were not so offensive as those alleged. The court was right in holding that he should not be confined to the occasion of which the witness had been testifying. The plaintiff had still the right to prove his charge as stated in his first count.

The evidence of the repeated statement by the defendant of the want of chastity of the plaintiff, and the subjects of conversation when the statements were made, tended to prove that the defendant was actuated by an evil motive, or malice,

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Opinion of the Commission, per LEONARD, C.

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as it is usually termed. If the character of the plaintiff for lewdness and incontinence with many men was settled, his son, who had been charged as the putative father of the plaintiff's child, might be exonerated and saved from an expensive charge. It was for the jury to consider whether the defendant had such a motive, or whether the slanderous imputation was made to excuse his son, among the members of his own family, from the charge of seducing and not marrying the plaintiff, and on that ground to be held as a privileged communication. For the same reasons the motion to strike out the evidence of this witness was properly denied.

It is also objected that none of the slanderous charges proven by this witness are contained in the first count of the complaint. The complaint alleges that the defendant stated of the plaintiff that she was a whore, a public whore, and that she had illicit intercourse and carnal intercourse with Joseph, etc. The witness testified, among several conversations had with the defendant, in which he made general charges implying a want of chastity by the plaintiff, that the defendant said "she has been whoring with one individual, and I can prove it." The witness said he could give the name of the person mentioned, but was not asked. This language was, in effect, substantially the same as that alleged in the complaint. It had the same meaning, and the character of the plaintiff was equally assailed by the one charge as the other.

It was not proven that this conversation transpired in the presence of, nor that it was reported to, the uncle of the plaintiff, with whom she resided, and who finally discarded her from his family, and refused her a home on account of these aspersions. This appears to have been the only pecuniary damage sustained by the plaintiff. Upon the authority of *Keenholts v. Becker* (3 Denio, 346), the action could not have been sustained upon the evidence of this witness, as to the slanderous charge, for the reason that it is supposed that it never reached the uncle, through whose action alone the plaintiff sustained any damage. I took

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Opinion of the Commission, per LEONARD, C.

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occasion to say, in the case of *Titus v. Summer* (44 N. Y. R., 266-269), that I doubted the doctrine of *Keenholts v. Becker* (*supra*), in this respect: A slanderous charge gets in circulation and is many times repeated until it often becomes impossible to trace it so that it shall appear to have been carried directly from the slanderer to the person from whom the pecuniary injury has been sustained by the party complaining. The rule is entirely too favorable for the malicious slanderer. He should be held responsible when it can be proven, as in this case, that the slander uttered did come to the knowledge of some person, who acted upon it to the pecuniary injury of the plaintiff. The injury has been done, and it is quite too logical and exact to require the plaintiff to follow the devious channels by which it has reached the person from whom she finally received some pecuniary injury. The present case does not turn on that question, but it leaves the question of malicious intention the only ground for supporting the refusal to strike out the evidence of the first witness, or take it from the consideration of the jury.

The uncle, who turned the plaintiff out of his house, afterward testified that the defendant, in his hearing, called the plaintiff "a whore and a perfect prostitute, and had been for two years before," and that he named a person who, he said, could prove it. This evidence was quite enough to sustain the action.

The other subjects discussed, as to whether the communication was privileged, and whether she was turned away from her uncle's house by reason of the slanders uttered by the defendant, were questions for the jury, and have been passed upon by them adversely to the defendant; with their action we have no concern.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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Statement of case.

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DANIEL B. KILLMORE, Respondent, v. ALFRED A. HOWLETT,  
Appellant.

A contract to cut trees standing upon the contractor's land into cord-wood and to deliver the wood at so much per cord, is not a contract for the sale of an interest in lands, and a writing is not necessary to give it validity.

(Argued January 9, 1872; decided May term, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial district, entered upon an order denying motion for a new trial and directing judgment for plaintiff upon a verdict.

This action was brought to recover damages for the breach of a parol contract. In January, 1864, the defendant being the owner of about eighteen acres of wood-land in that county, entered into a parol agreement with the plaintiff, by which the defendant agreed, in consideration that the plaintiff would pay him therefor five dollars per cord, to commence at once and cut the trees then standing and growing on said lot into cord-wood, and deliver the same to the plaintiff at his wood yard in Syracuse; the defendant, in pursuance of and in part performance of the agreement, cut and delivered to the plaintiff sixty cords, for which the plaintiff paid him the price agreed upon; the defendant cut, in all, out of the trees standing and growing on the lot, one hundred and sixty-seven cords, the price of which having advanced from five to seven or eight dollars per cord, he refused to deliver to the plaintiff the balance. Defendant moved for a non-suit upon the ground that the agreement was for the sale of an interest in real estate and being by parol was void; the motion was denied and the defendant excepted. The jury rendered a verdict in favor of the plaintiff for \$428.42 damages; judgment upon the verdict was stayed, pending a motion for a new trial ordered to be heard in the first instance at General Term, when judgment was ordered and entered for the plaintiff on the verdict.

Opinion of the Commission, per GRAY, C.

*G. N. Kennedy* for the appellant. A contract for the sale of standing timber is a contract for the sale of an interest in land. (*Bennett v. Scutt*, 18 Barb., 347; *Green v. Armstrong*, 1 Denio, 550; *Bank of Lansingburgh v. Crary*, 1 Barb., 542; *Warren v. Leland*, 2 Barb., 613; *McGregor v. Brown*, 6 Seld., 114; *Pierpoint v. Barnard*, 5 Barb., 364; *Brown on Frauds*, § 252; *Daniel v. Ferguson*, 1 Hayes, 540; *Westbrook v. Eager*, 1 Har., 81; *Buck v. Pickwell*, 1 Williams, 157.) It does not affect the question that the parties contemplated a severance of the timber by defendant. (*Green v. Armstrong*, 1 Denio, 555; *Frank v. Harrington*, 36 Barb., 415.) That a part of the wood was delivered does not affect the validity of the contract. (*Baldwin v. Palmer*, 10 N. Y., 232; *Thayer v. Rock*, 13 Wend., 53.)

*D. Pratt* for the respondent. The contract was not for the sale of an interest in lands. (2 Pars. on Con., 312, 313, and note; *Whitemarsh v. Walker*, 1 Mees., 313; *Nettleton v. Sykes*, 8 id., 34; *Saundersbury v. Matthews*, 4 Mees. & W., 347; *Smith v. Surpham*, 9 B. & C., 561; *Evans v. Roberts* 4 id., 529.)

GRAY, C. If the standing trees upon the lot, which by the contract were to have been cut by the defendant and made into cord-wood, and delivered by him to the plaintiff at Syracuse, had, instead of the wood to be made therefrom, been sold in their standing condition, "rooted in the soil," the right of the plaintiff to enter and fell them, and make them into wood, would have been a sale of an interest in the land, and without being evidenced by writing would have been void. (*Green v. Armstrong*, 1 Denio, 550, 553 *et seq.*) This was not a sale of the trees in their standing condition, but rather a contract by the defendant to bestow work and labor upon his own material, and deliver it in its improved condition to the plaintiff. In a similar case, LITLEDALE, J., in *Smith v. Surnam* (9 B. & C., 561, 566) held it not to be the intention to give the vendee any property in the trees until

## Statement of case.

they were severed from the freehold. Apply the rule contended for by the defendant, and a writing would be indispensable to the validity of a contract by the owner of a peat bed or a sandbank to deliver a load from it. Such contracts are never regarded as carrying an interest in the real estate from which the thing sold was to be taken by the owner. The judgment should be affirmed.

All concur.

Judgment affirmed.

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155 528;

ANTONIO R. FERNANDEZ et al., Respondents, v. THE GREAT WESTERN INSURANCE COMPANY, Appellant.

THE SAME, Respondents, v. THE NEW YORK MUTUAL INSURANCE COMPANY, Appellant.

An insurance for a single premium upon a vessel, at and from the port where she is lying to another, is a continuous and indivisible risk; and a voluntary and unnecessary departure from port, except upon the voyage insured, avoids the policy and discharges the underwriter from all liability under it.

Defendant insured plaintiff's vessel then lying in port at New York undergoing repairs, "at and from New York to Havana." After the repairs were completed, the vessel went on a trip to Elizabethport, N. J. (sixteen miles distant from New York), to test her engines and take in coal. She returned to New York and subsequently sailed for Havana, and while prosecuting her voyage was destroyed by fire.

*Held*, that the voyage to Elizabethport was in violation of the terms and conditions of the policy, and defendant was not liable thereon.

(Argued January 9, 1872; decided May term, 1872.)

APPEALS from judgments of the General Term of the Superior Court of the city of New York, entered upon orders denying motions for new trial and directing judgment upon verdicts in favor of plaintiff.

The actions were brought to recover the amount insured on the propeller J. F. Barnard, afterward called the Morro,

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Statement of case.

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under two several policies issued by the defendants respectively.

The policy of the Great Western Insurance Company was dated on the eighteenth day of March, 1863, and that of the New York Mutual Insurance Company on the next day thereafter. They were severally issued to "A. R. Fernandez & Co., on account of whom it may concern," insuring the said vessel, her tackle, apparel and other furniture, "at and from New York to Havana," among other perils against that by fire to the amount of \$7,500 for a premium of \$375.

The provisions in the policies material to the decision of the questions disposed of upon these appeals are substantially the same.

It was declared in each of the policies that the adventure upon the said vessel, tackle and apparel was to begin at and from New York, and should so continue and endure until the said vessel should be safely arrived at Havana, and be there moored twenty-four hours in good safety, and among other provisions in each was the following: "And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any port or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance."

In the applications for insurance it was stated that the vessel would sail "in a few days."

It appeared on the trial that at the time the insurances above mentioned were effected, the vessel was lying at the dock at the foot of Corlear's slip, or that vicinity, in the city of New York, fitting for sea, and that repairs and additions then in progress for that purpose were completed by the sixth of April. On that day she went on a trial trip to Elizabethport, in the State of New Jersey, sixteen to twenty miles distant from New York, to test her engines and to take in coal there. Having taken about seventy tons of coal on board, she returned to New York on the next or the second day after she left New York. On her return trip it was discovered that her exhaust or escape pipe was too deeply sub-



## Statement of case.

merged, and that the coal was of poor quality. After her arrival at New York the coal was discharged, and the difficulty or defect in regard to the pipe was remedied. She was then, on the seventeenth or eighteenth of April, taken in tow of another steamer to Jersey City to take in a new supply of coal. While on her passage there she came in collision with a schooner and sustained considerable damage, which was repaired by the first day of May. Having taken in her coal and provisions, she, on the morning of the next day, sailed for Havana, and on the third day of May, while prosecuting her voyage, she was destroyed by fire.

A motion for a dismissal of the complaints was made on behalf of the respective defendants, when the plaintiffs rested their case, on the grounds, among others, that there was a deviation from the voyage insured, by a delay in sailing on the voyage to Havana till the second of May, and by making the trial trip to Elizabethport in the meantime. The motions were denied and proper exceptions were taken.

At the close of the whole testimony the court, against an exception by the defendants, directed the jury to find a verdict in favor of the plaintiffs for the amount insured, with interest, less the premium note due to the Great Western Insurance Company, with interest.

The above exceptions, and others not necessary to be particularly noticed, were ordered to be heard, in the first instance, at General Term. They were all overruled (BARBOUR, J., dissenting), and a judgment was ordered and entered on the verdict for the plaintiffs.

*Joseph H. Choate* for The Great Western Insurance Company, appellant. The voyage to Elizabethport was a deviation. (3 Kent, 312; Smith's Mer. Law, 3 Am. ed., 459; *Child v. S. M. Ins. Co.*, 3 Sand., 26; 1 Philips' Ins., §§ 983, 1,000; 2 Parsons' Mar. Ins., §§ 2, 7, 48; 1 Arnold's Ins., § 354; *Brown v. Tayleur*, 4 A. & E., 241; 3 Kent, 307; *Stevens v. Com. Ins. Co.*, 26 N. Y., 397; *Day v. Orient M. Ins. Co.*, 1 Daley, 13; *Robertson v. Col. Ins. Co.*, 8 J., 491.) Necessity

## Statement of case.

is the only excuse for a deviation. (*Maryland Ins. Co. v. Le Roy*, 7 Cranch., 36; *Robertson v. Columbian Ins. Co.*, 8 Johns., 491; 3 Kent's Com., 317; *Coffin v. Newburyport Ins. Co.*, 9 Mass., 449; *Beatson v. Hanworth*, 6 T. R., 531; *Hartly v. Buggin*, 3 Dougl., 39; *Augusta Ins. and Banking Co. v. Abbott*, 12 Md., 348; *Fox v. Black*, 2 Park on Ins., 488; *Townsend v. Guyon*, id., 438.) The delay in port for forty-four days was a deviation. (1 Arnold, 383; 1 Parsons' Mar. Law, 281; *Palmer v. Marshall*, 8 Bing., 79; *Mount v. Larkin*, 8 id., 108; *Palmer v. Fanning*, 9 id., 460.)

*R. S. Emmet* for The New York Mutual Insurance Company, appellant. Besides being a breach of express contract, the delay for forty-four days was a deviation that discharged the underwriters. (1 Arnold on Ins., 348, 388; 3 Kent on Con., 5th ed., 315; 1 Parsons' Mar. Law, 281; *Palmer v. Marshall*, 8 Bing., 79; *Palmer v. Fanniny*, 9 id., 460; *Mount v. Larkin*, 8 id., 108; *Coffin v. Newburyport Mut. Ins. Co.*, 449; *Augusta Ins. and Bank. Co. v. Abbott*, 13 Md., 348.) The voyage to Elizabethport avoided the policy. (1 Arnold on Ins., 364; 1 Parsons' Mar. Law, 281; *Brown v. Tayleur*, 4 A. & E., 241; *Coffin v. N. Ins. Co.*, 9 Mass., 449; *Beatson v. Hanworth*, 6 T., 531; *Vos v. Robinson*, 9 J. R., 192; *Elliot v. Wilson*, 7 Bro. Par. C., 459; *Fox v. Black*, Parsons on Ins., 295; *Townsend v. Guyon*, id., 295; Evans' Essays, 88, title Deviation.) The deviation cancels the policy, whatever may be its effects and results as regards damages to the vessel. (1 Arnold, 342; *Hartley v. Buggin*, 3 Dougl., 39; *Augusta Ins. and Banking Co. v. Abbott*, 12 Md., 348; Park on Ins., 294; Evans' Essays, 88.)

*Richard H. Huntley* for the respondent. The remaining in port forty-four days is not a deviation if there was a necessity for the delay. (*Coffin v. Newburyport Marine Ins. Co.*, 9 Mass., 436, 449; *Palmer v. Marshall*, 8 Bing., 79; *Same Case*, id., 317; *Langhorn v. Alnut*, 4 Taunt., 511; *Earl v.*

## Opinion of the Commission, per LOTT, Ch. C.

*Shaw*, 1 Johns. Cases, 313; *Grant v. King*, 4 Esp., 175; 2 Parsons' Mar. Law, 283, and cases cited in note 3; 2 Parsons' Mar. Ins., 11, note 2; *Gilfret v. Hallet*, 2 Johns. Cas., 296; *Phillips v. Irving*, 7 M. & G., 325; *Driscoll v. Passmore*, 1 B. & P., 200.) The trial trip to Elizabethport was necessary and did not vitiate the policy. (*Col. Ins. Co. v. Catlet*, 12 Wheat., 383; 1 Phil. Ins., §§ 982, 1000; 2 Par. Mar. Law, 278.)

LOTT, Ch. C. Assuming that the policies on the vessel insured continued in force till the sixth day of April after their respective dates, her trial trip to Elizabethport on that day avoided them and discharged the defendants from liability for any subsequent loss. The vessel was insured "*at and from New York to Havana*." This insurance imposed a liability on the defendants from the time it was effected, and was to continue till the arrival of the vessel at Havana, allowing her to remain a reasonable time at New York, preparatory to sailing for her place of destination. A continuous and indivisible risk was contemplated, and for that, one single premium was fixed and agreed to be paid. There was no division or apportionment of that premium applicable to separate and distinct risks, one having reference to the vessel during her stay at New York, and the other to perils after her departure. The provision in the policies that the adventure upon her was to begin "at and from" New York, and *so continue and endure* until her safe arrival at Havana, and being moored there for twenty-four hours in good safety, clearly defines when the liability was to commence, and shows that it should be continuous from that time until the period fixed for its termination.

A departure from New York, except on the voyage to Havana, is inconsistent with that provision and the continuity of risk contemplated by it, and the subsequent clause providing that it should and might be lawful for the said vessel, on her voyage, to proceed and sail to, touch and stay at any port or places, if thereunto obliged by stress of weather

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Opinion of the Commission, per LOTT, CH. C.

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or other unavoidable accidents, without prejudice to the insurance, declares, by necessary implication, that a deviation for any other cause would be unauthorized, and, consequently, could not be made without impairing the claims of the assured. Elizabethport was not a part of or within the port or harbor of New York, but is in the State of New Jersey, distant sixteen to twenty miles from New York, and not in the ordinary course of a voyage to Havana, and no necessity is shown for proceeding to that place, either for making a trial trip or taking in coal. That voyage must, in the absence of any proof to warrant it, be considered as voluntarily made, and in violation of the terms and conditions upon which the liability of the defendants was assumed. It was entirely distinct from and unconnected with the voyage insured. Although the vessel returned to New York and afterward sailed for Havana, that was not the voyage in the contemplation of the parties or intended to be insured, when the insurance was effected. They acted and made their contract, having reference to the facts and circumstances existing at that time. The vessel was then nearly ready for sea. It was expected that she would sail in a few days, and that on leaving New York she would proceed direct on her voyage to Havana. There is not the least foundation or any plausible color to justify the conclusion or an inference that either party, when referring to the adventure "at and from New York," described in the policies, had reference to or could have meant one that should begin after the vessel had sailed therefrom and again returned thereto, subsequent to a voyage to another place or port; or, in other words, that it should begin after an independent and intermediate voyage had been made and entirely completed. It is also clear that when the vessel was at Elizabethport she was neither at New York nor on a voyage therefrom to Havana, and consequently the policies had at that time ceased to protect her, and nothing that subsequently occurred could restore the obligation of the underwriters and again renew their liability, without their consent. It follows, from the preceding considerations, that there was

## Opinion of the Commission, per LOTT, Ch. C.

such a deviation from the voyage insured as to discharge the defendants from their liability under the policies. Their motions for the dismissal of the complaints should therefore have been granted and the judgments were erroneously ordered against them.

It is, however, proper to refer to the opinion of the majority of the court below on ordering judgment for the plaintiffs. MONELL, J., by whom it was given, says: "Although the underwriters are discharged if the loss occurs upon a policy 'at and from' a port of departure while the vessel is away from such port for any unexcused purpose," yet they will not be absolved if the vessel returns in safety and is afterward lost upon her voyage; and one reason is that the policy covers two risks, one at the port of departure and the other from such port upon the voyage to the port of destination. These risks are wholly independent and distinct from each other. The former insures against the enumerated perils while the vessel lies in port, and if she is taken from such port for any unjustifiable purpose and is lost while absent from such port the obligation of the insurers is at an end. The latter risk is limited to the voyage and takes effect upon the departure of the vessel. If at that time no loss has occurred, the contract continues binding."

That construction cannot be sustained. No case or authority is cited to support it, and the court concedes that it is opposed to and adverse to the decision in *Brown v. Tayleur* (4 Add. & El., 241; 31 Eng. C. L. R., 60.)

In that case the insurance was on a ship "at and from her port of lading in North America to Liverpool." After she had taken a part of her cargo on board at one port, she sailed to another in the same bay of the sea described by different witnesses as five and seven miles distant, but not in the line of voyage to Liverpool to complete her loading. After remaining there three weeks and taking in additional cargo she returned to the port which she had left to receive provisions, water and wood and to be got ready for sea. Nine

days afterward she sailed therefrom for Liverpool and was lost on the voyage.

It was held (Lord DENHAM, C. J. and PATTERSON, WILLIAMS and COLERIDGE, JJ., *seriatim*, giving opinions) that the port where she commenced loading was her port of lading, within the meaning of the policy, and that her departure therefrom to another port, as above stated, was a deviation and avoided the policy.

The same principle was decided by the Supreme Court of this State, in *Vos v. Robinson* (9 Johns. R., 192). In that case the voyage insured was "at and from Port Plata, St. Domingo, to New York," and the vessel covered by the policy was shipwrecked and lost in going from Port Plata to Susua. She had a permit from the government at Port Plata to go to Susua for the loading of mahogany, and would have been obliged to return to Port Plata for her clearance. Susua was included within the revenue district of Port Plata, and about four leagues east therefrom. It was held that Port Plata proper was the port of departure, and that there was a *deviation* from the voyage insured. It will be seen that the vessel had not cleared for New York, and consequently was not in the course of her voyage there at the time of her loss, but that she had to return to Port Plata, her port of departure. The result of the decision, therefore, is, that the policy ceased to be binding and effectual after the vessel left that port, although for a temporary object and purpose only, and with the intention, on the part of her master, to return thereto; and it affirms the proposition above stated by me, that the vessel insured, under the policies in question, was not protected or covered by them when she was at Elizabethport. (See, also, 1 Phil. Ins., § 1000; 2 Parsons Ins., 7, 46-52.)

Without further citation of authorities, a perfect answer to the position that the policy covered two risks, independent and distinct from each other, exists in the fact that there is but one *single and entire* premium. What portion of this was applicable to the risk on the vessel while in port, and what portion on that during her voyage? It is impossible to

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Opinion of the Commission, per HUNT, C.

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say. It may also be asked if there were two risks, how much was the amount insured on each risk? Certainly not the whole sum of \$7,500 specified in the policies, and there is no means of determining the proportion; and if for any cause the plaintiffs should have become entitled to a return of a portion of the premium on either risk, how much would have been returnable?

I forbear to pursue these inquiries or the further consideration of the question. If it be conceded that there were separate, distinct and independent risks, the fact does not benefit the plaintiffs. It would then follow as a practical result that there are, in effect, two policies, one on the vessel while in port "at New York," and the other on her voyage "from New York." The latter, under the facts disclosed in the case, never attached. The voyage to Elizabethport clearly is a bar fatal to a recovery. That was a new, distinct, different and intermediate voyage, not in contemplation of the parties at the time their contract was made, and it operated as an abandonment of the voyage insured. (See 3 Kent, 5th ed., 317; Parsons' Mercantile Law, p. 457.)

Having reached the conclusion that the judgments appealed from are erroneous, on a ground common to both cases, I do not deem it necessary to consider the effect of the bill of sale from the plaintiffs to Kain, nor any of the other questions raised on the trial.

The judgments must be reversed and a new trial ordered on the ground stated, costs to abide the event.

HUNT, C. The application for insurance of the vessel, signed by the plaintiffs' agent, contained a warranty that the vessel was in "perfect order," and also that she would "sail in a few days." On the trial, no attention was called to the first branch of this objection. When the plaintiffs' case was closed, the defendants moved for the dismissal of the complaint upon four different grounds specifically stated. Neither of them contained any reference to this objection, nor was there any allusion to it, when the case was finally closed, at

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Opinion of the Commission, per HUNT, C.

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the circuit. Evidence was given to show that the underwriter was informed that the vessel was undergoing extensive repairs, and was being thoroughly remodeled, and that the inspectors employed by the underwriter visited her and made their reports upon her condition. This was expressly denied, on the other hand. It is quite likely that there was a fair question, under this point, to be submitted to the jury, if such submission had been requested. No such request was made, and under the evidence as it stands, and without attention to the point on the trial, we are not justified in saying that there was a breach of this warranty as to the condition of the vessel.

The alleged breach in the other respect, to wit: that she should "sail in a few days," formed one of the grounds of the motion to nonsuit, but there was no request that the jury should receive any instructions in relation to it. The insurance covers the vessel while in port preparing for her voyage. The rule is, that such delay must be for a reasonable time only. As it is expressed in another form, the departure must be in a reasonable time. Were there no excusing facts in the case, a delay of forty-five days in the clearing of a ship, whose intended voyage would occupy only five or six days, would, appear to be unreasonable. Here again the conflict of testimony is important to be considered. If the vessel was in perfect order ready for sailing, but a few days, literally, would be required to load and start her, or should be allowed for that purpose. If, on the other hand, the vessel was in good order for river navigation, but was being remodeled and substantially rebuilt to fit her for an ocean steamer, several weeks might well be exhausted in that duty. Again, this vessel, while under repairs, met with various disasters and calamities, which delayed her completion. I cannot discover such a state of facts as, upon the principles of law laid down by the appellants, would justify the court in saying that, as a matter of law, and necessarily, there was a breach of the warranty that the vessel should sail in a few days. The jury might have so found, but the question was not submitted to them, and



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Opinion of the Commission, per HUNT, C.

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neither party asked that it should be. (1 Arnold, 383; 1 Par. Mar. Law, 281.)

The principal point in the case is that arising upon the alleged deviation in visiting the port of Elizabeth, New Jersey, a distance of sixteen to twenty miles, for a trial trip and to procure coal. This occurred on the sixth of April. The port of Elizabeth was not on the route to Havana, and was reached by going down the New York bay, either outside or inside of Staten Island, but in each case inside of Sandy Hook. She returned from Elizabeth to New York within a day or two. When loaded at Elizabeth with seventy tons of coal, it was found that her exhaust pipe was submerged and needed to be altered. The coal was found to be unsuitable and was removed and other coal substituted. Coal could readily be obtained at different places in the port of New York. The defendants offered to prove that, by the custom of New York, trial trips are the subjects of separate insurance and separate premiums, also the usual insurance premium on a voyage to Elizabeth, both of which offers were excluded by the court. The court directed a verdict for the plaintiffs for the amount of the loss.

The law is firmly settled that a deviation from the voyage limited in the policy, unless compelled by necessity, avoids the policy. It matters not how short may be the deviation, nor how harmless, nor, indeed, does it aid that it should be shown that the alteration made a shorter and a safer voyage, and thus was of positive advantage to the underwriters. The contract is to insure upon a voyage between the points named, in the regular and customary track. The moment the vessel voluntarily and without necessity departs from the due course of the voyage, the contract is at an end, and the underwriter is freed from responsibility. (3 Kent Com., 312; Smith's Mer. Law, 3d Am. ed., 459; 1 Arnould Ins., 354; *Stevens v. Com. Ins. Co.*, 26 N. Y., 402.)

*Brown v. Tayleur* (4 Ad. & Ells, 241) is in point. The Penrith was insured "at and from her port of loading

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Opinion of the Commission, per HUNT, C.

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in North America to Liverpool." The vessel took in a part of a cargo of timber at Cocagne, New Brunswick, in July. In August she sailed to Buktonche, five to seven miles distant, to complete her cargo. Buktonche and Cocagne are situated on different creeks of the same bay. The vessel returned to Cocagne on the 22d of August to get wood, water and provisions. She took on no additional cargo there, unless a few sticks of timber, which was doubtful. She sailed for England on the 31st of August, and was lost on the voyage. Neither of these ports had a custom-house, though there were officers of customs at both places, and both were within the jurisdiction of the custom-house of St. John, N. B. (31 E. C. L. R., 121.)

It was held by the Court of King's Bench, Ch. J. DENMAN presiding, that there was a deviation and the policy was avoided. Justice PATTERSON says: "When she began to take on her cargo at Cocagne, that was her place of loading, and her removal afterward to Buktonche was a deviation." Justice COLERIDGE says: "It makes a difference whether a ship stays at one place to load, or goes on a roving voyage to pick up a cargo."

*Vos & Lightbourne v. Robinson* (9 J. R., 191) is an earlier case in our courts, where the same point was adjudged, and in the same manner. *Elliot v. Welmer* (7 B. Par. Cas., 459); *Kettell v. Wiggins* (13 Mass. R., 68), are decisions to the same effect, on facts of quite a similar character.

I find but a single authority which seems to conflict with these general views. In *Parsons on Mar. Law* (vol. 2, p. 278, § 2), the writer says: "It is perfectly well settled that any deviation whatever discharges the insurers from all further responsibility, leaving them, however, liable for a loss occurring before the deviation, and caused by a peril insured against; nor are they discharged if the change of risk is merely temporary, and when it ceases, all subsequent risks are precisely and certainly the same as they would have been had no deviation taken place. In this case the effect of the deviation is only to suspend the responsibility of the insurers and

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Opinion of the Commission, per HUNT, C.

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discharge them from any liability for a loss which occurs during the existence of the deviation. But it is obvious that there are few changes of risks that can be said to leave all the subsequent perils in precisely the same condition as if there had been no change, and this exception, therefore, is seldom applicable." The answer to this authority, as applicable to the present case, is apparent. The rule thus laid down by Parsons is true as to a time policy under certain contingencies, but never as to a voyage policy. The illustration given by the learned writer on this rule is of that character. Thus, he says, if a steamboat makes regular trips between two ports, is insured for one year, and if, after the trip for the day is ended, she should tow a vessel, or do any similar act, the underwriters would clearly be liable if she were subsequently lost on a regular trip or while lying in port, but not if she were lost while engaged in towing. This may be. If so, it would be upon the principle that the time policy operates as a new and separate insurance upon every trip made between the ports designated. Every time she starts from the port of departure a new insurance comes into existence, and it might well be said that the offences committed upon a former voyage, and under a former policy, could not affect the last voyage. (See *Day v. Orient*, 1 Daley's R., 13; *Robertson v. Columbian M. Ins. Co.*, 8 J. R., 491.)

The qualification imposed by the learned author, "that all subsequent risks shall be certainly and precisely the same as if no deviation had taken place," destroys the rule. No such certainty can exist. If the vessel is delayed an hour, or hastened an hour, it is obvious that she may incur perils which that change of time created or increased. It is impossible to say, with certainty, that every circumstance of time, place, weather, enemies, condition of the captain or crew or vessel, occurring after a change, would have been the same had there been no change. The vessel we are looking after spent three days in going to Elizabeth and returning. The coal there loaded was taken out and other coal put in. How many hours, alteration in the time of her final departure

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Opinion of the Commission, per HUNT, C.

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this made, who can tell? Who can tell whether she received a strain not perceptible, a secret injury, some damage to the coal bins, which was connected with her subsequent destruction by fire? These are speculations. They may be well founded. They may be entirely without foundation. They serve to illustrate the danger of departing from the well settled rule of law. I repeat it, as well expressed by Justice SEDGWICK, in *Coffin v. Newburyport Mar. Ins. Co.* (9 Mass. R., 436): "It is undoubtedly true that the shortness of the time, or the distance of the deviation, makes no difference as to its effect in the contract; whether for one hour or one month, or for one mile or one hundred miles, the consequence is the same. If it be voluntary and without necessity, it puts an end to the contract."

The plaintiffs seek to obviate the difficulty by the argument that the voyage to Elizabeth was a trial trip, and that such experiment was necessary before the vessel could safely proceed on her voyage to Havana. All the cases show that necessity excuses a deviation; such as stress of weather, compulsion of a superior power, or a change for the relief of a vessel in distress. But it must be necessity. Thus in *Phelps v. Auldjo* (2 Camp., 350), where the master of a vessel went out of a harbor by order of the captain of a frigate lying near, to examine a strange sail, Lord ELLENBOROUGH ruled it to be a deviation, remarking that if he had gone by compulsion, or under threat, or just fear of violence, it would not have been so. No necessity is shown for the vessel in this case to go out of the limits of the port of New York. Apparently she could have been tested as well by going down the bay to Staten Island as by going to Elizabeth. She did not go out into the broad ocean, as it appears that her voyage was inside the Hook. The opportunity to test her fitness for the sea could have been perfectly attained without going to another port, in another State, at a distance of eighteen or twenty miles. On this point, as well as the supplying her with coal, there is not the slightest evidence of a necessity for leaving the port of New York. The contract bound her to remain in the port

## Statement of case.

of New York, "at New York," until she should take her departure "from New York to Havana." (See authorities *supra*.) This contract was violated by the deviation to Elizabeth, without compulsion or necessity, and the responsibility of the underwriter thereupon ceased.

Judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

D. KELLOGG LEITCH et al., Respondents, v. HENRY WELLS, President, etc., et al., Appellants.

Where a certain sum is bequeathed to executors in trust, to pay the interest thereof at a fixed and stated rate to one, and upon his death to divide the principal among others, the executors cannot, without the consent of the *cestuis que trust*, or, in case they are infants, without an order of the court, set apart and appropriate bank stocks to the satisfaction of the trust, and release the residue of the estate from its liability to perform the trust.

The *cestuis que trust* may assent to and accept such an appropriation; but if, before this is done, new interests and new parties have intervened, the situation of the property at the time of such intervention must determine the rights of all who claim to be interested in it.

An executor has a right to sell and transfer stocks and other securities of the estate, and one who buys in good faith, paying in money the price agreed upon, or who loans money upon security of the property, is not responsible for the application of the purchase-money or money loaned, and his right to the property transferred is not affected by knowledge upon his part, of the existence of a claim for a legacy or a debt against the estate generally.

As coverture does not prevent the acquisition of property by a married woman, the fact of coverture does not affect the title to stock transferred by her; and where the stock stands in her name the certificate is evidence of its absolute ownership by her; and in case there is nothing in it or connected with it indicating a trust in favor of another person, one loaning money upon pledge of the stock as security is warranted in making the loan upon the assumption of such ownership; he is not bound to inquire and ascertain how she obtained it.

48	585
132	256
48	585
132	572
48	585
168	502
168	503
48	585
169	473
48	585
76	AD'487

## Statement of case.

The commencement of an action by the service of a summons does not create a *lis pendens* affecting third persons not parties to the action. To bind a purchaser *pendente lite* by the judgment, there must also be a bill or complaint on file at the time of his purchase, in which the claim upon the property is set forth.

The rule of *lis pendens* is a hard one, not a favorite of the courts, and a party claiming the benefit of it must clearly bring his case within it. In the absence of proof, therefore, it will not be presumed that the complaint was filed prior to the entry of judgment.

Stocks are articles of commerce, passing from hand to hand like commercial paper, and the doctrine of constructive notice by *lis pendens* is not applicable to them. (EARL, C.)

The legal title to the stock of a bank passes by an assignment and delivery of the certificate therefor, although there be no transfer upon the books of the bank.

(Argued January 9, 1872; decided May term, 1872.)

APPEAL by the defendant Henry Wells from judgment of the General Term of the Supreme Court in the fifth judicial district, affirming a judgment of Special Term in favor of the plaintiffs.

The action was brought in September, 1864, by the plaintiffs, children of Catharine K. Leitch, deceased, to compel a transfer by the defendant to them of 107 shares of the capital stock of the Tompkins County Bank, and 73 shares of the capital stock of the Bank of Syracuse, of the par value of \$100 per share, and for an account and payment of the dividends received thereon.

The complaint alleged substantially that the said stock, and fifty shares of the capital stock of the Onondaga County Bank, also of the par value of \$100 per share, amounting to the aggregate par value of \$25,000, had, previous to the tenth day of October, 1850, been set apart, designated and appropriated by the executors of the will of Daniel Kellogg, deceased, as a trust fund of that amount given by him to them for the benefit of the said Catharine K. Leitch (who was his daughter) during her life and of her children after her death; that John Kellogg, one of the said executors, subsequently, and during the year 1858, transferred the said stock, with twenty-six shares of the Bank of Syracuse, and fifty-five shares

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Statement of case.

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of the Onondaga County Bank, additional, belonging to the estate of Daniel Kellogg, to Paulina W. Kellogg, his wife, on the transfer books of the said banks, respectively, without her knowledge, and without any consideration given therefor, and he received the scrip therefor in her name in the usual form; that after such transfer had been made, the said Paulina W. Kellogg, at the request of the said John Kellogg, her husband, signed blank powers of attorney, in the usual form for the transfer of stock in incorporated companies; that the said stock continued to stand in her name at the time of the commencement of this action, but the said scrip had never, in fact, been in her possession.

It then alleged that, on the 29th day of November, 1861, the said Catharine K. Leitch, and the plaintiffs in this suit, commenced their action against the said John Kellogg, and Paulina W. Kellogg, and duly impleaded them in respect of the said stocks so set apart and appropriated by said executors of said Daniel Kellogg, in satisfaction of said legacies of \$25,000 for the benefit of said Catharine and her children. And then after stating that, subsequent to the joining of issue in the said action, and after the death of said Catharine K. Leitch (who died intestate on the 3d day of October, 1862), a supplemental complaint was, by order of the court, filed and served, by which D. Kellogg Leitch and David K. Kellogg, duly appointed administrators of the said Catharine, were substituted as plaintiffs in the said action, in the place of said Catharine, deceased; that answers were put in to said supplemental complaint, and that issue was duly joined therein; it is alleged that such proceedings were thereupon had in said action that afterward and on the 12th day of September, 1864, final judgment was entered in said action, by which it was ordered and adjudged that, by the setting apart of said stock by the said executors, to wit, the said 127 shares of the capital stock of the Tompkins County Bank, the said seventy-three shares of the capital stock of the Bank of Syracuse, and the fifty shares of the capital stock of the Onondaga County Bank, the same were held by the said John Kellogg from the time

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Statement of case.

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of such setting apart until the death of the said Catharine K. Leitch, in trust, to pay the annual income thereof to the said Catharine K ; and that upon her death the plaintiffs in the cause, her children, became the owners of and vested with the absolute title to the said stocks, and that the same, from that time to the present, have continued to be, and are, still vested in these plaintiffs, together with all unpaid dividends thereon, and that the pretended sale and transfer of said stocks by the said John Kellogg to the said Paulina was void and vested in her no title to the same.

It is then alleged that since the commencement of said action against the said John Kellogg and the said Paulina W. Kellogg, and while the said action was pending, to wit, some time in the year 1863, the said John Kellogg, assuming to act as attorney for the said Paulina, under said blank powers of attorney, assigned the scrip for the ninety-nine shares of the stock of the Bank of Syracuse, so held by him in the name of Paulina, to the defendant the American Express Company, and delivered to them the said scrip, and that in the month of April, 1864, while said action was also pending, he in like manner assigned the scrip for 107 shares of the capital stock of the Tompkins County Bank to the said American Express Company, delivering in like manner said scrip to them.

And the plaintiffs then, after stating that the said company still held the said scrip at the time of the commencement of this action, that they claim to own and be entitled to the same stock, and to have the same transferred upon the books of said banks, and had demanded the allowance of such transfer by them, and after making some allegations in denial of the title of the company, and asserting their own, asked judgment, declaring said stock to be their property, and directing the delivery of said scrip to them.

The defendant Henry Wells answered the said complaint, admitting the transfer and delivery by Paulina W. Kellogg to the American Express Company of 124 shares of the capital stock of the Bank of Syracuse in 1862, and of 107 shares of



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Statement of case.

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the capital stock of the Tompkins County Bank in 1864, but denying that they are the property of the plaintiffs, and all knowledge or information sufficient to form a belief whether the same be the shares or scrip of stocks mentioned in the complaint. All the other allegations in the complaint were put in issue.

The defendant answered and alleged as a further and separate defense, that the said scrip for the 124 shares of the stock of the Bank of Syracuse, with a regular assignment and transfer thereof, and a power of attorney authorizing and directing a transfer thereof to the express company attached, was, on or about the 20th day of May, 1862, delivered to it as collateral security for the loan of \$11,000, then made to the said John Kellogg, and that the scrip for the said 107 shares of the stock of the Tompkins County Bank, with a like assignment and power of attorney attached, was, on or about the 25th day of March, 1864, delivered to the said company as collateral security for a loan of \$10,000, then made to said John Kellogg; and he alleges that the said company made said loans in good faith, upon the faith of the security of the said shares of said stocks, and well believed at the time that the said John Kellogg had right, authority and power to deliver the same as security therefor; that the said company had no knowledge of any of the matters set up in the complaint, or of the claim of any other person to the said stocks, and had no reason to believe that the plaintiffs, or any other person than said Kellogg, had any interest in said stocks, that the said loans remained wholly unpaid, and that the first knowledge the said company had of any claim of the plaintiffs to said stocks was the commencement of this action.

The issues were tried at a Special Term, and the following facts were found :

That the principal allegations of fact in the plaintiffs' complaint were proved, except that the scrip for the seventy-three shares of the stock of the Bank of Syracuse was delivered to the American Express Company on the 30th day of May, 1862, instead of the year 1863, as stated in the said complaint.

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Statement of case.

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Second. That the said scrip in question was received from John Kellogg, by the American Express Company, as collateral security for loans of money, made at the time by said company to said Kellogg, without any actual knowledge on the part of said company of the pendency of the suit of Catharine K. Leitch and the present plaintiffs against John Kellogg and Paulina W. Kellogg, his wife, mentioned in said complaint, or of any claim of the plaintiff in this action, to the stock in question, or that John Kellogg was an executor and trustee under the will of Daniel Kellogg, deceased.

Third. That the plaintiffs in the said action obtained no injunction restraining the transfer of the stock during the pendency of the action, nor did they apply for a receivership of the stocks.

And upon these facts the said judge found as conclusions of law : 1st. That the said stock was a trust fund in the hands of the executors of the will of said Daniel Kellogg, and the survivor of them, for the payment of the legacy of \$25,000 bequeathed by him to the said Catharine and her children, the plaintiffs in this suit. 2d. That the assignment of the said stock by John Kellogg to his wife, Paulina W. Kellogg, was fraudulent and void, as against the *cestuis que trust*, Catharine K. Leitch, and her children the plaintiffs, and transferred in fact no valid title in said stock to her. 3d. That the assignment of the said scrip of stock by John Kellogg in the name of his wife, Paulina W. Kellogg, to the American Express Company, did not vest any legal title to the same in said company, and if thereby any equitable title in said stock was vested in said company, it was subordinate to the paramount equity of the plaintiffs in this suit to said stock. 4th. That the said company having received the said scrip during the pendency of the action commenced by Catharine K. Leitch in her lifetime, and the plaintiffs in this suit against John Kellogg and Paulina W. Kellogg, his wife, the judgment in that suit is conclusive upon the claim of the said company in this present action. 5th. That the plaintiffs were entitled to a judgment directing a transfer of the said stock by the company to the

## Statement of case.

plaintiffs and for the payment of the dividends accrued thereon with costs against the defendant Henry Wells, as president of the said company.

Exceptions were duly taken to the several conclusions of law. Judgment was subsequently entered in conformity with the decision.

*Hooper C. Van Vorst* for the appellants. The stocks in question were not held by John Kellogg in trust. (*Diven v. Lee*, 36 N. Y., 302; *Talbot v. King*, 1 Hand, 76.) A trustee may dispose of a trust estate to a *bona fide* purchaser, without notice, so as to bar the *cestui que trust*. (Story's Eq., §§ 977, 1264; *Oliver v. Wells*, 3 How. U. S., 333, 401; 2 Kent, 307; 1 R. S., 728, § 58.) Executors can mortgage or pledge the assets of the estate. (Dayton on Surrogates, 2d ed., 280; *Boget v. Hertel*, 4 Hill, 492; Williams on Ex'rs, vol. 2, pp. 838-841; 2 Dickens' Rep., 725; *Hutchins v. State Bk.*, 12 Metc., 421.) No actual transfer on the bank books was necessary to perfect defendants' legal title. (Angell on Corporations, § 564; *Sargent v. Franklin Ins. Co.*, 8 Pick., 98; *Sargent v. Essex R. W. Co.*, 9 id., 202; *Bank of Attica v. Smalley*, 2 Cow., 770; *Mt. H. T. Co. v. Jewell*, 17 N. J., 117; *Kortright v. Corn Bank*, 22 Wend., 348; *Bank of Attica v. M. & T. Bank*, 20 N. Y., 501.) The doctrine of *lis pendens* does not affect defendants, as it does not appear complaint was filed. (2 Sugden, 544; 1 Vernon, 318; Daniels' Ch., 56; *Hayden v. Bucklin*, 9 Paige, 514.) The judgment roll is not evidence against defendants, who were not parties. (1 Greenleaf's Ev., § 522.)

*D. Pratt* for the respondents. The pendency of an action is notice to all persons purchasing the subject-matter of the action after the commencement of the suit. (*Murray v. Ballou*, 1 J. Ch., 566, 577; *Same v. Lylburn et al.*, 2 id., 441, 445; *Jackson v. Andrews*, 7 Wend., 152, 156; *Parks v. Jackson*, 11 id., 442, 451, 457; *Stuyvesant v. Hall*, 2 Barb. Ch., 151; *Metcalf v. Pulveroft*, 2 Ves. & Beams, 200;

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Opinion of the Commission, per Lorr, Ch. C.

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*Gaskill v. Durdin*, 2 Ball & Beat., 147; *Harrington v. Slade*, 22 Barb., 161; *Jackson v. Lassee*, 4 Sand. Ch., 381; *Hayden v. Bucklin*, 9 Paige, 512; *White v. Carpenter*, 2 id., 217, 252; Tiff. on Trustees, 821.) The absolute owner of property may convert himself into a trustee, without transmuting the possession, by a proper declaration of trust in writing. (Tiff. on Trustees, 354; *Moak v. Kittellwell*, 1 Hare, 404; *Suarez v. Pumpelly*, 2 Sand. Ch., 336; 4 Hare, 120.) The charter of the Tompkins County Bank and the general banking law make the stock of these banks transferable on the books of the banks only. (Laws of 1836, p. 511, § 27; Laws of 1838, p. 249, § 19.) The interest which passes in such cases by a delivery of the scrip is equitable only. (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 3 Kern., 600, 626; *Union Bank of Georgetown v. Love*, 1 Wheat., 390; *Stebbins v. Phoenix Fire Ins. Co.*, 3 Paige, 350; 2 Conn., 529; 3 id., 544; 5 id., 246; 6 id., 552.) The equity of the plaintiffs, being prior in time, must take the preference. (*Bush v. Lathrop*, 22 N. Y., 535; *Muir v. Schenck*, 3 Hill, 228, 546.) The husband is incompetent to convey directly to his wife. (*Van Arydale v. Wright*, Lalor, 260; *Dempsey v. Tyler*, 3 Duer, 73.)

Lorr, Ch. C. The stock in question stood in the name of Paulina W. Kellogg, and the certificates issued by the banks of her title thereto were evidence of its absolute ownership by her.

There was nothing in them, or connected therewith, to show or indicate a trust in favor of any other person. Their production to the express company, with a power of attorney signed by her in the usual form for the transfer of stock in incorporated companies, warranted and justified it in making the loans it did on the assumption of such ownership.

The assignment of those certificates and the delivery thereof to the company, with the said powers of attorney, vested the *legal title* to the stock in the company.

A transfer on the books of the banks was not necessary for

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Opinion of the Commission, per LOTT, Ch. C.

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such purpose. (*Kortright v. The Commercial Bank of Buffalo*, 20 Wend., 91, and the *Commercial Bank of Buffalo v. Kortright*, S. C., in error, 22 id., 348; *McNiel v. Tenth National Bank*, decided in Court of Appeals 1871, 46 N. Y. R., 325.)

The fact that Mrs. Kellogg was a married woman did not affect the title of the company thus acquired. Her coverture did not prevent the acquisition of property by her, and a purchaser thereof was not bound to inquire or ascertain how she obtained it.

If it be conceded that she did not hold it as her separate estate, her husband, in that case, might have asserted his marital rights and claimed it as his own, but that, under the circumstances disclosed in this case, would not invalidate or impair the right of the company. His agency in making the transfer would estop him from questioning it. (See *Edgerton v. Thomas*, 5 Seld., 40.)

It is, however, claimed that the defendant's title is affected by the judgment in the suit of Catharine K. Leitch and the plaintiffs in this action against John Kellogg and Paulina W. Kellogg, referred to in the complaint, on the ground that the stock in controversy was purchased during its pendency.

That claim or position is not available.

The facts alleged in the complaint do not show nor is it found by the judge who tried this action that a *lis pendens* was created by that suit.

The only allegation in reference to it is "that on the 29th day of November, 1861, the said Catharine K. Leitch and the plaintiffs in this suit commenced their action against the said John Kellogg and Paulina W. Kellogg, and duly impleaded them in respect of the said stocks, etc." There is no averment or any statement showing *when* the complaint therein was filed, and, by reference to the judgment record, it appears from the summons that it was not filed when that was served, and it is shown by the complaint itself that it was not verified till the 12th of March, 1862. The commencement of the action by the service of the summons did not create a *lis*

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Opinion of the Commission, per HUNT, C.

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*pendens* affecting third persons, not parties to the action. The filing of the complaint was necessary for that purpose. (See 1 Vernon, Ch., 318; Bouvier's Law Dict., title "Lis Pendens," 14th ed., vol. 2, 76; *Murray v. Ballou*, 1 Johns. Ch. R., 566, etc.; *Murray v. Lylburn*, 2 id., 441; *Hayden v. Bucklin*, 9 Paige, 512, 514; 4 Bouvier's Inst., 514, 516.)

It may also be stated, in this connection, that the complaint, after stating the claims of title by the defendant to the stock under the transfer of the scrip or certificates of stock, impeaches its validity on the sole ground that "neither the said John Kellogg nor Paulina W. Kellogg had any right or title thereto, and therefore could confer no right or title thereto to said Express company," and that the said stock was then the property of the plaintiffs; and the proceedings and judgment in that action appear to be stated as part of the plaintiffs' title, and not for the purpose of charging that the Express company was bound by the judgment. It is, however, unnecessary to pursue the inquiry. It is sufficient to say that the allegations in the complaint and the findings of the court are not sufficient to charge the company with constructive notice of the plaintiffs' rights or title, and it is expressly found that it had no actual knowledge of the pendency of the suit, or of any claim by the plaintiffs to the stock in question, or that John Kellogg was an executor and trustee under the will of Daniel Kellog, deceased.

Having arrived at this conclusion, it is unnecessary to consider whether the allegations in the complaint in that suit are sufficiently specific to charge third persons with notice of the plaintiffs' claim.

The judgment must, on the ground stated, be reversed and a new trial ordered, costs to abide the event.

HUNT, C. In August, 1858, John Kellogg transferred to his wife, Paulina W. Kellogg, seventy-three shares of the capital stock of the Bank of Syracuse. In May, 1859, John Kellogg transferred in like manner to his wife 107 shares of the capital stock of the Tompkins County Bank. The trans-

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Opinion of the Commission, per HUNT, C.

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fers were duly made on the books of the respective banks, and new certificates issued in the name of Mrs. Kellogg, which were delivered to her or her agent.

The defendants afterward advanced \$21,000 upon the security of a transfer of these certificates, and an authority to transfer them to themselves on the books of the banks, viz., on the 30th of May, 1862, \$11,000 upon the stocks first named, and on the 25th of March, 1864, \$10,000 on the stock lastly described. The plaintiffs claim that the defendants obtained no title to these stocks, for the reason that John Kellogg held the same as trustee under the will of Daniel Kellogg for their mother and themselves, and that the transfers of the same by John Kellogg were in violation of his duty as trustee, and that in law the defendants had notice of the interest of the plaintiffs in the stocks. John Kellogg was, also, an executor under the will of Daniel Kellogg. An executor, it is not denied, may make a transfer of personal property which will give a good title to a *bona fide* purchaser, although the transfer is made in violation of the duty of the executor. The executor is the owner of the personal property of the testator; the absolute title vests in him, and he possesses the *jus disponendi* in its full force. The honest purchaser is under no duty to see that the moneys are faithfully applied by the executor. (*Bogert v. Hertel*, 4 Hill, 492; 2 Wms. Exrs., 838, 841.) Assuming it to be a trust, the argument, if I correctly understand it, in addition to the point of notice, is this, that the trust became executed, the absolute ownership vested in Mrs. Leitch and her children, and consequently John Kellogg had no title whatever, and none could be transferred by him. In this view, the question was presented prominently, was this specific stock held by John Kellogg as trust property under the will of Daniel Kellogg? It amounts to a claim that the stock is to be dealt with as if Daniel Kellogg, in creating the trust referred to, had, by his will, set apart and devoted this stock to the satisfaction of that trust.

Daniel Kellogg died in 1836, leaving a very large estate.

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Opinion of the Commission, per HUNT, C.

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By his will, made ten years before his death, he made disposition of his property chiefly to his wife and his seven children. The will, in its first clause, appointed John Kellogg, George F. Leitch and David A. Comstock executors of the same. It also contained, among others, the provision following: "I give and bequeath unto the said John Kellogg, George F. Leitch and David A. Comstock, their executors and administrators, the sum of \$25,000, upon trust, to pay the interest, at the rate of seven per cent per annum, of the said sum of \$25,000, to my daughter, Catharine K. Leitch, for her sole and separate use during her life, exclusive of her husband, and for which her receipt alone shall be a sufficient discharge, and from and after the decease of my said daughter Catharine, then, as to the said sum of \$25,000, in trust for her child or children living at her death; if more than one, equally to be divided between them; but if she shall not have a child living at her death, then my will is that \$5,000 of said sum shall be paid to her husband, if any living, and the remainder of the sum of \$25,000, being \$20,000, shall sink into, and become and be part of the residue of my personal estate; and if she shall not have a child or husband living at her death, then my will is that the said sum of \$25,000 shall sink into and become and be part of the residue of my personal estate."

The testator made a provision in the same language for his daughter, Mrs. Converse, and also for his unmarried daughter, Sally Maria Kellogg.

The executors took charge of all of the estate of Mr. Kellogg, and there is no evidence of any interference with them until the year 1848. In that year a bill was filed by Augustus Converse, as administrator of his wife, a daughter of Daniel Kellogg, the daughter having died in January of that year. After setting out the will of Daniel Kellogg, the complaint alleged, among other things, that the executors had taken upon themselves the execution of the will, that the personal estate was of the value of \$450,000 dollars, and claimed to recover the distributive share of his wife in the



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Opinion of the Commission, per HUNT, C.

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estate. The defendants answered, and a reply was put in. In May, 1850, a petition was presented in the same suit, in which the insolvency of each of the executors is alleged, and praying the appointment of a receiver to take charge of the property of the estate. It was ordered that Mr. Leavenworth be appointed such receiver, and that the executors transfer to him all the property and effects of the estate, under the order of Mr. Outwater, as referee. On the 10th of October, 1850, such conveyance and transfer was made by the executors, with certain exceptions. It is upon and by means of the effect of such exceptions that it is claimed that the stocks in question became impressed with the trust for \$25,000, in favor of Mrs. Leitch and her children. The exceptions are as follows: "Excepting and reserving, however, from this assignment, a certain fund of \$25,000, consisting of shares of capital stock in the Tompkins County Bank, amounting to \$12,700, and shares of the capital stock of the Bank of Syracuse, amounting to \$7,300, and shares of capital stock in the Onondaga County Bank, amounting to \$5,000, making the said sum of \$25,000, with the certificates and vouchers pertaining thereto, which fund has been set apart, designated and appropriated, by the said parties of the first part, as such executors and trustees as and for the sum of \$25,000, given to them in and by the said will of Daniel Kellogg, in trust, to pay the interest thereof to Catharine K. Leitch, wife of the said George F. Leitch, during her life, and then in trust for her children, and which fund is not to pass under this assignment." The stocks described had not then been, and never were, in fact, set apart and appropriated by the executors for the purpose stated. The Converse suit was subsequently settled by the parties, and the assets and effects transferred to Mr. Leavenworth were by him so transferred to the executors.

I agree with the learned judge, who delivered the opinion in the court below, that a fair test to determine whether these stocks became specifically devoted to the satisfaction of this trust is this, if the banks had failed and the stocks become

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Opinion of the Commission, per HUNT, C.

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worthless, would the loss have fallen upon Mrs. Leitch and her children? If yes, then are the stocks referred to impressed with the trust; if not, they are not.

In determining this question, certain further facts are to be considered:

1. That no order of the court directed this exception or reservation. The order was general, that the executors convey all the estate of Mr. Kellogg, in their hands, without qualification or limitation. The exception was voluntary, and the recital is the voluntary declaration of the executors.

2. There is no judicial recognition of this exception. There is no evidence that the document in which the statement is made was presented to or sanctioned by the court.

3. D. Kellogg Leitch, George F. Leitch and David H., the plaintiffs in the present suit, were neither of them parties to the Converse suit in which this action occurred. This exception was made in an instrument executed in October, 1850. At that time, D. Kellogg was of the age of fifteen; George F. of the age of seven, and David H. of the age of ten years.

4. The interest of these children in the \$25,000 was a vested estate. Although they could not enjoy the fruits during the life of their mother, the title vested at once upon the birth of each, and the estate in the infant was as perfect in law as if there were no intermediate life interest.

5. At that time, the estate of Daniel Kellogg owned 127 shares of the Tompkins Bank stock, and ninety-nine shares of the Syracuse stock, and 105 shares of the Onondaga Bank stock, of the total value of \$33,100, all of which were transferred by John Kellogg to Paulina W. Kellogg. What became of the remaining twenty shares of the Tompkins Bank stock, and the remaining twenty-six shares of the Onondaga Bank stock, does not appear. Whether these remaining shares are supposed to be impressed also with the trust—whether they have been applied to the discharge of the debts or other trusts of the estate, or whether they have been squandered, does not appear. The

## Opinion of the Commission, per HUNT, C.

aggregate value of these stocks was \$8,100 more than the amount of the original trust. By Mr. Kellogg's will a trust was created, but no particular property was appropriated for its satisfaction. The interest on the same, given at seven per cent, was to be paid to Mrs. Leitch, \$1,750. These stocks might yield more or might yield less, or might be lost by failure of the banks, still the full sum of \$1,750 must be paid annually to Mrs. Leitch or to her children. I doubt not that, by the formal consent of Mrs. Leitch, certain property might be set apart and appropriated by the executors to the satisfaction of the trust. (*Wood v. Wood*, 5 Paige, 596.) Surely no such appropriation could be made by the executors without her consent, which should have the effect to release the residue of the estate from its liability to perform the trust. I do not find any evidence in the case that Mrs. Leitch consented to accept these stocks for that purpose. The Converse suit was settled and was discontinued—Mrs. Leitch's attorney assenting. This was, doubtless, an assent on her part to everything necessarily dependent upon such settlement. What the terms of that settlement were is not shown by the case. Mr. Converse obtained such satisfaction of his wife's interest in the estate as he was willing to accept. There is nothing to indicate that the exception and declaration of trust referred to was an essential part of the judgment, or that it was communicated to or understood by Mrs. Leitch. The contrary plainly appears by the statements in the original bill filed by her in March, 1862, and the supplemental bill filed in November, 1863. If there had been a failure of these banks, Mrs. Leitch would have still been entitled to the annual sum of \$1,750 from the estate. Mrs. Leitch's life interest being at an end, her children, who were minors during the pendency of the Converse suit, now claim the \$25,000. It has been decided by the Court of Appeals, in *King v. Talbot* (40 N. Y. R., 76), that it is a violation of duty in a trustee or executor to invest the funds under his control in bank stock. If he assumes to do so, the investment is at his risk, and the ward or infant can repudiate it on reaching his

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Opinion of the Commission, per HUNT, C.

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majority. If the \$25,000 had been invested in 1858 by the trustees specifically in these bank stocks, such investment could not have been valid, much less can it bind the infants when it is a mere statement that there is a setting apart of such stocks already in their hands, and made without the knowledge or consent of the infants. An infant's consent cannot justify what would otherwise be illegal, but it certainly cannot relieve an illegality that there is no pretense of such consent. (Hill on Trustees, 382 [585]). The form of property devised to infants cannot be changed even by legislative authority, although the same trusts are impressed upon the property, in its changed form, as originally existed. (*Smith v. Brown*, 35 N. Y., 83.)

It is my judgment that there was never a legal appropriation of the stocks in question to the satisfaction of this trust. They remained in the hands of the executors as assets in their charge.

There has been no acceptance by the plaintiffs, nor any assent by them to the appropriation by the executors of these stocks to the satisfaction of the trust, until after the defendants' rights had attached. New interests and new parties having intervened, the situation of the property at the time of such intervention must determine the rights of all who claim to be interested in it.

By the judgment upon the report of the referee in the suit of *D. Kellogg Leitch et al. v. John Kellogg and Paulina Kellogg*, dated July 22, 1864, it was adjudged that the stocks in question were impressed with the trust in favor of Mrs. Kellogg and her children, and that the transfer to Paulina Kellogg was void; that Mrs. Leitch and her children were entitled to all the dividends previously made upon the stocks. By the original complaint made in that suit, verified March 12, 1862, it was charged that John Kellogg had received into his individual possession 300 shares of the capital stock of the Bank of Syracuse, value \$100 per share; 100 shares of Onondaga Co. Bank, value fifty dollars a share; 1,200 shares of Auburn Bank; 127 shares of the Tompkins

## Opinion of the Commission, per HUNT, C.

County Bank ; that from time to time he made transfers to his wife which were fraudulent. It is alleged that the Tompkins Bank stock was set apart as a trust fund in favor of Mrs. Kellogg and her children. Nothing was said in the complaint about the stock in the Bank of Syracuse.

Unlike trustees, who must act unitedly, one executor may effectually bind or dispose of the assets of the estate by his single act. (Hill on Trustees, 306 [466] ; 2 Wms. Exrs., 620.)

The stocks in question were transferred by John Kellogg to Paulina W. Kellogg. By her they were transferred to the defendants, who advanced their money on the faith of the security, without knowledge that John Kellogg was executor, that Paulina was his wife, that there was any litigation or question from any source respecting it. Ordinarily this would give the defendants a right to hold the stocks to the amount of their advance. The executor has the right to sell and transfer, and one who buys of him in good faith, and pays in money the price agreed upon, is not responsible for the application of the purchase-money. (Authorities *supra*.) The same rule applies to one who loans money on the security of the property. (*McNeil v. Tenth National Bank*, 46 N. Y. R., 325.)

It is said that the commencement of the suit in December, 1861, by Mrs. Leitch and her children, was notice to all the world, the defendants included, of the claims of the plaintiffs upon this stock *as cestuis que trust* ; that in the theory of law the defendants bought with notice of all the facts, and stand in the same position as if they had received actual notice of them. If I am right in my opinion, that these stocks were not specifically subject to a trust, this question does not arise.

It would then be the case of property held by an executor, and a claim for a legacy or a debt against the estate generally. This does not prevent a transfer of any portion of the estate to one aware of these facts. If it exists in the case, the question of *lis pendens* is an embarrassing one.

There is no doubt of the general rule, that a purchase *pen-*  
SICKELS—VOL. III. 76

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Opinion of the Commission, per HUNT, C.

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*dente lite* does not vary the rights of the plaintiff in the suit, who is not to receive any prejudice in the suit from the alienation, and that, although he pays his money in good faith, the purchaser is bound by the judgment in the suit. The statute of this State makes a material alteration of this rule in regard to real estate, by enacting that the pendency of a suit is not notice to a stranger until the notice of *lis pendens* is actually filed in the clerk's office of the county where the land is situated, and that, as to one having no actual notice, he may, in good faith, and for a good consideration, acquire a good title, until such notice is filed. (Code, § 132.)

¶ This relaxation of a rigorous rule applies to real estate only, and, as to personal property, the rule remains as at the common law. It is conceded to be a harsh rule, and one that sometimes operates unjustly. It was based, no doubt, upon the theory that the register's office, like the recording office now, was open to examination, and that the proper attention, in looking there, would protect the purchaser from injury. Hence it was established, as a part of the rule, that for this purpose a suit was not to be deemed as commenced until the bill was actually filed. A subpoena was the actual commencement of the proceeding, but, for the purpose of charging one not a party to the suit with notice of the proceeding, the suit was deemed to have been a suit commenced only from the time of the bill filed. Thus in *Murray v. Ballou* (1 Johns. Ch., 566), cited in the opinion below, Chancellor KENT says: "Admitting that Ballou had no knowledge, in fact, of the suit of *Mrs. Green* against *Winter*, he is nevertheless chargeable with legal or constructive notice, so as to render his purchase subject to the event of that suit. The established rule is, that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser, so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpoena after the bill is filed.

The chancellor says, this is no more than an adoption of the rule of the common law, where, if the defendant aliens after pendency of the writ, the judgment in the real action

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Opinion of the Commission, per HUNT, C.

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will over-reach such alienation. It was one of the ordinances of Lord BACON, he says, laid down for the better administration of justice in the Court of Chancery, that "no decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and so made no party, neither by bill nor order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, then regularly the decree bindeth." (Bacon's Works, vol. 4, p. 511.) This the Chancellor declares to be the rule, and it makes the liability of the purchaser to depend upon the fact that the bill has been exhibited previously to the purchaser. The case of *Culpepper v. Austin* (2 Cas. in Ch., 115) is cited in the same book, where a testator had conveyed his lands to an executor, in fee, to pay his debts, and the defendant purchased of the trustee for a valuable consideration. The heir filed his bill to have the land, on the ground that it was not needed to pay debts. The defendant lost his purchase, having purchased and paid on the same day the bill was exhibited. (1 Johna. Ch., 578.) In the same opinion are cited: *The Bishop of Winchester v. Paine* (11 Ves., 194); *Preston v. Tubbin* (1 Vern., 286); *Anon.* (1 id., 318); *Self v. Madox* (id., 459); *Finch v. Newnham* (2 id., 216); in each of which it appears that the bill had actually been filed before the purchase was made.

In *Hayden v. Bucklin* (9 Paige R., 513), the chancellor says: "The only question, therefore, for consideration is, whether the mere issuing of the subpoena is to be deemed a *lis pendens* in this court, so as to affect the validity of a transfer of the subject-matter of the litigation here as a purchaser *pendente lite*." It was held that it was not. There the transfer had been made intermediate the issuing of the subpoena and its service. (See also *Hopkins v. McLaren*, 4 Cowen R., 667.)

By the statute, 4 Anne (cited *Hayden v. Bucklin*, *supra*), it was enacted that no subpoena should be issued until bill filed, save in excepted cases. In other words, the filing of the bill was the commencement of the suit. Such was, for a

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Opinion of the Commission, per HUNT, C.

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long period of time, the practice in this State, until the adoption of the new system of practice in 1848. (1 Barb. Ch. Practice, 1.) Under this practice, the rule was uniform that where a bill was filed and a subpoena served the suit was deemed to be commenced, and any subsequent acquisition of interest was subject to the decree to be obtained therein.

The rule that might be inferred from the expressions in some of the cases, that after bill was filed the commencement of the suit related back to the issuing of the subpoena, has not, for the purpose we are considering, been adopted as the rule in this State. It would be hard, indeed, where one honestly purchased and fully paid, there being no *lis pendens*, that a subsequent act, to which he is not consenting and of which he had no knowledge, should create a *lis pendens* retroactively, and thereby a purchase become invalid which was perfectly valid when made. It would be hard not only, but in violation of just principle.

By the practice in existence in this State, when the action of Mrs. Leitch against John Kellogg was commenced, it was not required that the complaint should be filed, nor even served, at the commencement of the action. The suit might be commenced by summons alone served upon the defendants, or by summons and complaint served upon the defendants.

In neither case was it required by law or by any rule of court that the complaint should be filed at the commencement of the suit. (Code, §§ 127, 128, 130, as amended in 1849.) When the judgment roll was made up and filed, it was required that the complaint should be therein incorporated as a part of the record. (Code, § 281.) This was indispensable to the making up of the record. By section 416, pleadings are required to be filed in ten days after service, or the opposite party might compel such filing on pain of its abandonment; this section was not imperative. If not filed, the opposite party could compel it to be done, or that the pleadings should be abandoned. As a matter of fact in practice, I believe the complaint was seldom filed or appeared in any other place than the judgment roll.



This practice and the rule of *lis pendens*, by which a purchaser is bound from the filing of the bill, must be adapted to each other. A summons issued and served, and a complaint filed in the clerk's office, by the examination of which a purchaser can ascertain that a claim is made upon the property which he intends to purchase, are necessary under the present practice to bind a purchaser *pendente lite*. In other words, to create the *lis pendens*, which will bind a purchaser to the judgment in such suit, there must be a first process, and a bill or complaint on file in which the claim upon the property is set forth.

So far as the case we are now considering shows, no complaint in the suit of *Mrs. Leitch v. John Kellogg* was ever filed until the judgment roll was filed.

This could not have been earlier than July, 1864, as the report of the referee, on which it is based, bears date of that time. The several advances and purchases upon the stocks in question were made by the defendants prior to that time, to wit, in May, 1862, and in March, 1864, respectively. My conclusion is that the rights of the defendants are not affected by the proceedings or by the judgment in that action.

By the instruments executed to the defendants by Mrs. Kellogg, the legal title to the stocks was transferred.

"For value received, I do hereby transfer, sell and assign unto the American Express Company," passes the legal title, although there be no transfer on the books of the bank. These are the apt words for a conveyance *in presenti*. The record at the bank is a formality which may make question with the bank, but is not important as between the vendor and the vendee.

The legal title is perfect without it. (*Kortright v. Com. Bk., Buff.*, 22 Wend., 348; *Bank of Utica v. Smalley*, 2 Cowen R., 770; *The Bank of Attica v. The N. & T. Bk.*, 20 N. Y. R., 50; *Gilbert v. Manchester*, 11 M. C., 11 Wend., 626; see also *McNiel v Tenth National Bk., sup.*, where all the authorities are reviewed.)

The transfer by John Kellogg to Paulina, his wife, was a

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Opinion of the Commission, per EARL, C.

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complete and executed contract. In any controversy involving an attack on this transfer it cannot be said that this transfer was absolutely void. It gave her the absolute possession and the legal title. It justified an action by her against any one who should interfere with that possession. (*Savage v. O'Neil*, 44 N. Y., 298; *Hunt v. Johnson*, id., 27), and a transfer to any one making a lawful purchase thereof. If there should be any question on this point, the defendant's claim under the transfer and pledge of the same certificates from John Kellogg himself, which is in evidence as a part of their title, would attach.

If the transfer to his wife is invalid, the title remains in him, and transfer from him to a *bona fide* purchaser is good upon the principles heretofore discussed.

I think there should be a new trial.

EARL, C. The stocks in question do not appear to have belonged to Daniel Kellogg in his lifetime. They belonged to George F. Leitch, who transferred them to the executors in 1847 and 1849. In May, 1850, the executors were ordered to transfer all the assets of the estate of Daniel Kellogg to Leavenworth, who was appointed receiver. In October of the same year they did transfer all the assets to the receiver, excepting and reserving a certain fund of \$25,000, consisting of shares of capital stock in the Tompkins County Bank, amounting to \$12,700, and shares of capital stock in the Bank of Syracuse, amounting to \$7,300, and shares of capital stock in the Onondaga County Bank, amounting to \$5,000, making the sum of \$25,000, which fund they declared to have been set apart, designated and appropriated by the executors, as and for the sum of \$25,000 given to them in and by the will of Daniel Kellogg, deceased, in trust for Mrs. Leitch and her children. The stocks of the two banks first named only are in controversy in this action.

The will contained no direction as to the investment of the fund of \$25,000, and hence the trustees were bound to invest it in such securities as were authorized by law, and they had

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Opinion of the Commission, per EARL, C.

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no right to invest it in bank stocks. (*Diven v. Lee*, 36 N. Y., 302; *King v. Talbot*, 40 id., 76.) This investment was wholly inoperative as to the *cestuis que trust*, unless they assented to or adopted it. It does not appear that they ever assented to or adopted it, or acquiesced in it until they served their supplemental complaint in the action against John Kellogg and wife; and they never received the dividends upon the stock.

The legal title to the stocks was in the trustees, and they could sell and transfer them so as to give a perfect title to a purchaser taking them for value and without notice of the trust. (Story's Eq. Jur., §§ 977, 1,264; *Oliver v. Piatt*, 3 How. U. S. R., 333.) A purchaser from a trustee, with knowledge of the trust, takes the property purchased charged with the same trust.

In 1858, John Kellogg, the surviving executor and trustee, transferred these stocks to his wife, and certificates of stock were then issued to her by the two banks, and thereafter the stocks stood in her name upon the books of the banks. This transfer was valid as against John Kellogg, and gave his wife, as against him, good title to the stocks. He surrendered his certificates of stock and caused the bank to issue certificates to her, and this transfer was as valid, as against him, as if he had gone to the banks and paid his money for the stocks and had the certificates made out in her name and given to her. As, however, she paid no value for the stocks, and took them with either actual or constructive notice of the trust, she took and held them subject to the equities of the *cestuis que trust*.

After the certificates were given to her, she gave a blank transfer, with blank power of attorney, to her husband, and on the 30th day of May, 1862, he pledged the stock of the Bank of Syracuse, and on the 25th day of March, 1864, the stock of the Tompkins County Bank, to the American Express Company, to secure loans made to him at the two dates. These pledges were perfectly good as against John Kellogg and his wife, and they were valid against the plaintiffs, unless the express company can in some way be charged with notice of the trust. The express company had the same right to

take the stocks in pledge, and, to the extent of its interest as pledgee, will be as thoroughly protected, as if it had purchased them for value and without notice.

If it had thus purchased them, it would have taken the absolute legal and equitable title to them, although they were not transferred on the books of the bank. (*Kortright v. Commercial Bank of Buffalo*, 22 Wend., 362; *McNeil v. Tenth National Bank*, 46 N. Y., 325.)

There is no pretence that the express company, at the time of either of the loans, had any actual notice of the trust; but it is claimed that it had constructive notice by the pendency of the suit of Mrs. Leitch and these plaintiffs against John Kellogg and his wife.

That suit resulted in a judgment in favor of the plaintiffs therein, declaring their interests in and title to the stocks in question. It is a rule in equity, long established and acted on, that a purchase made of property actually in litigation *pendente lite*, although for a valuable consideration and without any express or implied notice, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit.

This rule is said to rest upon the presumption that every man is attentive to what passes in the courts of justice of the State or sovereignty where he resides, and to be founded upon public policy; for otherwise alienations and transfers of title made during the pendency of a suit might defeat its whole purpose, and there would be no end to litigation. (Story's Eq. Jur., §§ 405, 406; *Murray v. Ballou*, 1 John. Ch., 566; *Murray v. Lyllburn*, 2 John. Ch., 441; *Green v. Slayter*, 4 John. Ch., 38; *Hopkins v. McLaren*, 4 Cow., 667; *Murray v. Blatchford*, 1 Wend., 583; *Jackson v. Andrews*, 7 Wend., 152; *Parks v. Jackson*, 11 Wend., 442; *Griffith v. Griffith*, 1 Hoff. Ch., 153; *Jackson v. Losee*, 4 Sand. Ch., 381; *White v. Carpenter*, 2 Paige, 217, 252; *Hayden v. Bucklin*, 9 Paige, 572; Comyn's Digest Chancery, "Lis Pendens.")

It will be seen by an examination of the cases cited that

## Opinion of the Commission, per EARL, C.

the rule has always been considered a very hard one in its application to *bona fide* purchasers for value, and it has only been tolerated by learned judges from a supposed necessity. Chancellor WALWORTH, in *Hayden v. Bucklin*, said: "This common-law rule of requiring purchasers, at their peril, to take notice of the pendency of suits in courts of justice for the recovery of the property they are about to purchase, although it is really impossible that they should actually know that such suits have been commenced, has always been considered a hard rule, and is by no means a favorite with the Court of Chancery." "This rule has most frequently been applied to purchasers of an interest in real estate, and very rarely, so far as I can learn from reported cases, to purchasers of personal property. As to real estate, it has long since been abrogated by statute in this State, unless a *lis pendens* has been filed in the proper clerk's office. As to personal property, in this age and country of great enterprise and rapid circulation of such property, it is capable of working more mischief than good, and can hardly claim to be founded on necessity or public policy. By injunctions and receivers, transfers of the subject of an action can be prevented during its pendency; and since parties can be examined as witnesses, actual notice, when it exists, of the action or outstanding equities can more readily be shown than formerly. But the rule has existed for centuries, and we cannot dispense with it in a case where it is fairly applicable. As it is, however, a hard rule, and not a favorite with the courts, a party claiming the benefit of it must clearly bring his case within it; and it is said that if he makes a slip in his proceedings the court will not assist him to rectify the mistake." (3 Sugden on Vendors, 460; *Sorrell v. Carpenter*, 2 P. Wms., 482.)

When must a suit, within the meaning of the rule, be deemed pending? I answer, not until the summons has been served, and the complaint filed. (*Hayden v. Bucklin*, 9 Paige, 512, 514.) In chancery, the subpoena performed the office of a summons under our present practice; and prior to the statute of Anne (4 Anne, ch. 16, § 22), the subpoena was

## Opinion of the Commission, per EARL, C.

issued before the bill was required to be filed, and the suit, as against the defendant himself, was then considered as commenced from the date of the subpoena. But after that statute the bill was required to be first filed, and for many purposes the suit was deemed to be commenced from the filing of the bill. (*Hayden v. Buoklin*, 1 Barb. Ch. Pr., 33, *supra*; *Webb v. Pell*, 1 Paige, 564.)

There could not, however, be a *lis pendens*, so as to bind strangers to the suit, until both the bill was filed and the subpoena served, and such has been the uniform holding of the courts since that time. It has sometimes been said, and it is now claimed by the learned counsel for the plaintiffs, that when a suit in chancery was commenced by the issuing and service of a subpoena, the bill being filed afterwards, the *lis pendens* was not complete until the bill was filed, but that then it related back and dated from the service of the subpoena. This claim has its sole foundation, so far as I have been able to learn, upon an anonymous case decided in 1685, before the statute of Anne, and reported in 1 Vernon, 319. The whole of that case as reported is as follows:

"That a subpoena served, bill filed is a *lis pendens* against all persons; but the service of a subpoena without a bill being actually filed makes no *lis pendens*; but the bill being filed, the *lis pendens* comes from the service of the subpoena, though it be not returnable till the next term, and though the party lives never so remote; otherwise a man, upon the service of a subpoena, might alien his lands and prevent the justice of the court; but that being by the counsel observed to be a hard fiction in equity to bind purchasers, it was proposed that some course might be taken by having some public record or calendar kept, whereunto purchasers might have resort, and see what lands are in demand in this court, as they may at law in cases of *finēs*. *Curia advisare vult*." I am unable to see that anything was decided by this case, but the question was held for further consideration; and yet this case has been cited by some elementary writers and by some judges, as establishing the rule as claimed. But there is no

reported case which I have been able to find, since that one, which lays down the rule as claimed.

Suits in equity may now be commenced by the service of the summons alone; but it would be quite monstrous to hold that the suit shall be deemed pending from the time of such service, so as to be "constructive notice" to all the people of the State of its pendency. No record is kept of the issuing of the summons, and it is not required to be filed. It may be issued by any one of several thousand lawyers in the State, or by any one of several hundred thousand persons in the State competent to be plaintiffs in a suit, and it might not be possible for a stranger to the suit, by any degree of diligence, to learn that it had been issued or served; and if he did perchance learn of it, it would give him no notice whatever of the subject-matter of the litigation. If, therefore, the mere service of a summons should be a *lis pendens*, so as to bind strangers, it would introduce great uncertainty and embarrassment into transactions in reference to personal property, provided the rule of *lis pendens* were extended as broadly as claimed for the plaintiffs in this case. I therefore hold that there is no *lis pendens*, so as to give constructive notice to strangers, until a summons has been served, and a complaint, distinctly stating the subject of the litigation and specifying the claim made, has been filed in the proper clerk's office. The rule as thus stated is sufficiently hard and unreasonable.

We come, then, to the inquiry in this case, as to when the suit of Mrs. Leitch and others against John Kellogg and wife was pending, within this rule.

The summons in that suit was served December 4, 1861, and there is no proof that either the original or supplemental complaint was filed before the judgment was entered, September 12, 1864. They may both have been filed before, and it is quite probable that at least the supplemental complaint was filed before. But they may not have been, and there is no proof upon the subject. The stock of the Bank of Syracuse was pledged May 30, 1862, and the stock of the

Tompkins County Bank March 25, 1864, both before the suit, as I hold the rule to be, was pending so as to give constructive notice. It is claimed, on the part of the plaintiffs, that this defect in their proof was not pointed out on the trial. It was not necessary for the defendant to do this. It was incumbent on the plaintiff to show actual or constructive notice of their equities to the defendant. If they relied upon this constructive notice, they should have shown that the complaint was filed before the stocks were pledged. It does not appear that the plaintiffs claimed that the complaint was filed before the pledge of the stocks, and it may be that they relied upon the literal pendency of the action, by the simple service of the summons, to give the constructive notice. When the judgment roll, in that action, was offered in evidence, the defendant objected, on the ground that it was not a party to the action, and had no notice thereof, and that it was not, therefore, bound by the adjudication therein; and there was a distinct exception to the findings of law by the court, that the express company was concluded by the judgment in that action, because they took the stocks in pledge during its pendency. Hence the question is properly before us, and we must hold that the express company was not, upon the proof produced at the trial, charged with notice of the pendency of that action, or of the equitable claims of the plaintiffs to the stocks in question.

The certificate of the stock of the Bank of Syracuse bore date August 2, 1858, and was pledged May 30, 1862, long before there can be any pretence that the supplemental complaint was filed. The original complaint does not contain sufficient allegations to show that this stock was in any way set apart as a portion of the trust fund of \$25,000, or that the plaintiffs in that action had any equitable claim thereto. Hence, as to this stock, for this reason also, there was no *lis pendens* as to the express company at the time it took the same in pledge.

But I have a still broader ground, unaffected by any form of pleading or defect in proof, upon which I must also base



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Opinion of the Commission, per EARL, C.

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my conclusion adverse to the plaintiffs. Stocks are articles of commerce, and the dealings in them every business day of the year far surpass in value the dealings in any other species of personal property. They pass from hand to hand in commercial transactions, like negotiable notes or bills of exchange. They are sold and pledged, and in many ways form the basis of credit.

Since the decision of the case of *McNeil v. Tenth National Bank*, above cited, certificates of stock, with blank assignments and powers of attorney attached, must be nearly as negotiable as commercial paper. The doctrine of constructive notice by *lis pendens* has never yet been applied to such property. This doctrine must have its limitations. It could not be applied to ordinary commercial paper, nor to bills of lading, nor to government or corporate bonds payable to bearer. Indeed, I do not find that it has ever been applied, and I do not think it ought to be applied, to any of the articles of ordinary commerce. Public policy does not require that it should be thus applied. On the contrary, its application to such property would work great mischief and lead to great embarrassments. As I have before stated, it has generally been applied to real estate, and but rarely to any species of personal property. I have in mind but one case (there are doubtless others) where it has been applied to personal property, and that is the case of *Murray v. Lyburn* (2 Johnson's Ch., 441), where it was held to apply to a bond and mortgage. In that case, the learned chancellor, however, says: "If he possess cash as the proceeds of the trust estate, or negotiable paper not due, or perhaps movable personal property, such as horses, cattle, grain, etc., I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealings would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce." And this language of the chancellor is cited with approval by Senator Seward in *Parks v. Johnson* (11 Wend., 458).

I have, therefore, reached the conclusion that the American

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Statement of case.

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Express Company was, at the time the stocks were pledged, unaffected with notice of plaintiffs' equities, and hence that its claim as pledgee is good as against them.

The judgment must be reversed and new trial granted, cost to abide event.

All concur.

Judgment reversed.

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JAMES CALKINS, et al., Appellants, v. JAMES M. SMITH,  
Respondent.

Where one member of a partnership, in order to pay his individual debt, makes his promissory note and indorses it in the firm name, without the knowledge or consent of his copartners, and the creditor with knowledge of the facts receives the note, and in order to bind the firm transfers it before maturity to a *bona fide* holder, the creditor is guilty of a fraud and is liable therefor. But the fraud is not upon the firm; it is only upon those who did not consent to the indorsement. The cause of action arising therefrom is no part of the assets of the firm, although the note has been paid out of such assets, and title thereto does not pass by a general assignment of all the property and effects of the firm, nor is any interest therein conveyed by an assignment made by one of the parties injured of his right and interest in the partnership assets. (LOTT, Ch. C., and GRAY, C., dissenting.)

Such a fraud does not work a joint injury for which the injured partners can unite in a common-law action. The damage sustained by each is in proportion to his interest in the partnership, and he must bring a separate suit to recover it. (EARL, C.)

Where in an action brought by two plaintiffs, they fail to establish a joint interest, but a separate cause of action in favor of one of the plaintiffs is established, the court has power, under § 274 of the Code, to give judgment in favor of the one and against the other, but it is not bound so to do, and a judgment against both is not erroneous.

(Argued January 10, 1872; decided May term, 1872.)

APPEAL from the judgment of the General Term of the Supreme Court in the eighth judicial district, affirming a judgment in favor of defendant, entered upon the decision of the

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Statement of case.

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court upon trial at circuit without a jury. The alleged cause of action arises out of the following facts :

On the nineteenth day of April, 1861, Charles W. Granis, James Calkins, Gustavus A. Scroggs and Rollin Germain formed a copartnership, under the name of Germain & Co.

On the twenty-fourth day of May, 1862, Rollin Germain made two promissory notes, bearing date on that day, payable to the order of Germain & Co., one for \$304.90, and the other for \$101. Both of these notes were, in the presence of the defendant, indorsed by Mr. Germain with the firm name of Germain & Co. The former note was then delivered to the defendant, as the administrator of the estate of Solomon G. Haven, to pay a debt which Mr. Germain owed that estate, and the other note was delivered by Mr. Germain to the defendant, as the executor of the will of Ira A. Blossom, to pay a debt which Mr. Germain owed the estate of Mr. Blossom.

Both of these notes were given and indorsed without the knowledge, authority or consent of any other member of the firm of Germain & Co., but Mr. Germain, "when he indorsed and delivered the notes to the defendant, represented to him that he was authorized to indorse them in the firm name, and that the firm was owing him money with which he expected to pay the notes."

The defendant, before the maturity of the notes, indorsed and negotiated them to the New York and Erie Bank, with intent to charge the firm. The bank discounted the notes in the ordinary course of business, before maturity, and paid the proceeds to the defendant.

The defendant, before the commencement of this action, paid the amount realized by him on the notes to the estates of Messrs. Haven and Blossom respectively, in payment of Mr. Germain's debts to those estates.

In September, 1862, the plaintiff, James Calkins, commenced an action in the Superior Court of Buffalo to dissolve the copartnership of Germain & Co., and close up its affairs.

## Statement of case.

A receiver was appointed in that action. The two notes of Mr. Germain, indorsed by him in the firm name of Germain & Co., were presented to the receiver. By order of the court they were paid out of the proceeds of the assets of the firm.

On the sixth day of June, 1863, Charles W. Grannis assigned his interest in the property of the firm of Germain & Co. to the plaintiff Henry W. Grannis.

On the seventh day of January, 1863, Messrs. Germain and Scroggs entered into a written agreement with the plaintiffs and Charles W. Grannis, by which they, among other things, assigned over to the plaintiffs their interest in the property and effects of the firm of Germain & Co.

On the third day of June, 1863, the receiver, under the order of the court, assigned to the plaintiffs the assets of the firm of Germain & Co. remaining in his hands.

The court, on these facts, decided the plaintiffs were not entitled to recover, and directed judgment for the defendant. Judgment was entered accordingly.

*C. C. Torrance* for the appellants. The indorsement of the firm name by Germain, for the payment of his own debt, was a fraud upon the firm. (*Livingston v. Roosevelt*, 4 John. R., 251, 278, 289, and cases there cited; *Boyd v. Plumb*, 7 Wend. R., 309.) The defendant was not a *bona fide* holder for value, and the indorsement was without value in his hands. (*Dobb v. Halsey*, 16 John. R., 34, 38; *Gansevoort v. Williams et al.*, 14 Wend. R., 133; *Williams v. Walbridge*, 3 id., 415; *Bank of Rochester v. Brown*, 7 id., 158; 1 John. R., 529; *Bank of Vergennes v. Cameron*, 7 Barb., 143; *Exchange Bank v. Monteath*, 24 id., 371; *Austin v. Vandermark*, 4 Hill, 259; 18 Wend., 478.) But the notes and indorsements having been transferred before due to the New York and Erie Bank, who were *bona fide* holders for value, the bank could recover against the firm upon the indorsements. (*Wells v. Evans*, 20 Wend., 251; 2 id., 324; *Livingston v. Roosevelt*, 4 John. R., 279; *Boyd v. Plumb*, 7 Wend. R., 310; *Austin v. Vandermark*,

## Statement of case.

4 Hill, 259.) This was a fraud upon the firm, whether defendant so intended or not. (*Decker v. Mathews*, 2 Ker., 319; *Livingston v. Roosevelt*, 4 John., 251, 272; 4 Taunt., 799; *Boyd v. Plumb*, 7 Wend. R., 309; *Gansevoort v. Williams*, 14 id., 133, 138; 1 Edon on Injunctions, 172, 210; *Hood v. Ashton*, 1 Russ., 412; *Newman v. Milner*, 2 Ves., Jr., 483.) Defendant cannot escape liability on the ground that he is acting as administrator and executor. (*Hecker v. De Groot*, 15 How. Pr. R., 314; Story on Agency, §§ 308-311.)

*John Ganson* for the respondent. The firm could not maintain an action against a third party to recover damages for the injury the firm sustained by a wrong committed by one of its members. (*Jones v. Yates*, 9 Barn. & Cress., 537; 17 Eng. Com. Law, 436; *Sparrow v. Chisman*, 9 Barn. & Cress., 241; *Wallace v. Kelsall*, 7 Mees. & Wels., 264; *General Mutual Insurance Company v. Sherwood*, 14 How. U. S. R., 351, 364; *Mathews v. The Howard Insurance Company*, 1 Kernan, 9, 17, 18.) The facts found do not state that the defendant was guilty of any fraud, and this court cannot infer fraud from any facts found. (*Oberlander v. Spiess*, decided in Court of Appeals January 26, 1871; *Meyer v. Amidon*, decided in Court of Appeals March 21, 1871.) The court, from the evidence given, will presume in favor of the judgment rendered, that the defendant was not guilty of any fraud. (*Carman v. Pultz*, 21 N. Y. R., 574; *Grant v. Morse*, 22 id., 323; *Phelps v. McDonald*, 26 id., 82; *Milhan v. Sharp*, 27 id., 624; *Smith & Coe*, 29 id., 666; *Brainard v. Dunning*, 30 id., 211.) In such a case as this the remedy must be sought in equity in an action against both offenders. (*Jones v. Yates*, 9 Barn. & Cress., 532; 17 Eng. Com. Law, 438; *Horner v. Wood*, 11 Cush., 62.) Plaintiffs had the right to call upon Germain to pay the note and have suffered no damages. The law presumes Germain solvent. (*Potter v. Merchants' Bank*, 27 N. Y. R., 641, 655; *Walrod v. Ball*, 9 Bar., 271.)

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Opinion of the Commission, per EARL, C.

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EARL, C. I propose to consider in this case but one question, which I regard as decisive of this appeal. When Germain indorsed the name of Germain & Co. upon the notes, without the knowledge or consent of his copartners, to pay his private debt, he undoubtedly committed a fraud upon them; and if the defendant aided in this fraud by transferring the notes to a *bona fide* holder, who could enforce them against all members of the firm, he was also guilty of a fraud, and liable to the copartners of Germain for all the damage he occasioned to them. But the fraud was not upon the firm. It was upon the three partners who did not consent to the indorsement. Germain, who made the indorsement, was not defrauded, and the firm could not have sued to recover damages for the fraud.

I am inclined to think that the fraud was not a joint fraud for which the three partners could unite in a common-law action. But it was a fraud upon each partner separately, for which he could sue alone to recover the damage which he sustained. The damage sustained by each partner was not the same, but was in proportion to his interest in the partnership. This is a common-law action for fraud, in which the plaintiffs base their right to recover upon a cause of action for fraud assigned to and jointly held by them. Plaintiffs' counsel, upon the argument before us, claimed that "plaintiffs took their title to this demand through the assignment from the receiver." But it passes my comprehension how they could get title to the cause of action from that source, as Tift was appointed receiver only of the assets of the firm. This cause of action was no part of the assets of the firm, was never vested in Tift, and he could not therefore transfer any title thereto to the plaintiffs. And the plaintiffs did not get any interest in the cause of action by virtue of the assignment to them from Scroggs and Germain, contained in the agreement of January 7, 1863. This is so, aside from any other reason that might be assigned, because they only assigned "all their right, title and interest in and to the property and effects of said firm of Germain & Co., and the choses in action of

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Opinion of the Commission, per EARL, C.

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said firm of every nature and description whatever." This assignment did not cover this cause of action.

For the same reason the plaintiff, Henry W. Grannis, did not get any interest in this cause of action by the assignment to him from Charles W. Grannis, dated June 6th, 1863, because that was an assignment only of the assignee's interest in the assets and property of the firm.

The sale of the assets of the firm to the plaintiffs could not, in any way, vest them with this cause of action for the alleged fraud. It is true that the fraud diminished the assets, but it was perpetrated months before the sale. It was not a fraud upon Henry W. Grannis, but upon the three partners of Germain. The plaintiffs took the assets as they were when they bought them. The fact that they had been diminished by a prior fraud, in no way connected with the sale to them, gives them no cause of action. The defendant had nothing to do with the sale of the assets, and the fact that he may have committed a fraud affecting the value of the assets upon the prior clause cannot make him liable to the plaintiffs.

Hence it is quite clear that Henry W. Grannis had no title to or interest in the cause of action, and that the plaintiffs have not, therefore, any joint interest in the cause of action which enables them to maintain this action.

If the alleged fraud was committed, it gave a cause of action to the plaintiff Calkins to the extent of his injury as one of the partners, which he could have prosecuted alone against the defendant, and probably the court had the *power* in this action, if the claim had been made, to have awarded to Calkins his damages in this action, giving judgment against the other plaintiffs under section 274 of the Code. But the court was not *bound* to do this, and committed no error in defeating the plaintiffs because they did not establish a cause of action in which both were interested. But the claim that Calkins had a separate cause of action for the fraud upon him was not put forth in the complaint, nor made upon the trial, nor upon the argument before us; and hence, even if we

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Dissenting opinion, per GRAY, C.

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should decide that, upon all the facts appearing in the case, he had a separate cause of action, it would not be proper for us, upon that ground, to reverse the judgment below.

The judgment, therefore, should be affirmed, with costs.

GRAY, C. (dissenting). The facts admitted by the pleadings and those found by the judge should be considered together; the former are conclusive, because the parties themselves best know what the facts are, and the latter can only be questioned in this court when there is not sufficient evidence upon which to rest the finding; the fact that the persons named in the complaint constituted the firm of Germain & Co., not being denied in the answer, is conceded; the complaint then states that Rollin Germain, one of that firm, made his individual notes, and without the knowledge or consent of the firm or either of its members, and in the presence of the defendant indorsed upon them the firm name of Germain & Co. and delivered them to the defendant, for the purpose of discharging an individual liability of Rollin Germain to the defendant, all of which was well known to the defendant at the time of his receiving the notes and indorsements. These facts, thus stated, are in no respect denied by the answer, except the single allegation that the notes were made, indorsed or delivered to pay an individual liability of Rollin *to the defendant*. This negotiation leaves the answer "pregnant with the admission" that the notes were made by Rollin, who, without the knowledge or consent of the firm or either of its members, and in the presence of the defendant indorsed upon them the firm name for the purpose of discharging an individual liability of Rollin Germain. (The denial that it was a liability to the defendant, is, at best, but technically accurate, the fact being that the notes were made, indorsed and delivered to the defendant for the purpose of discharging an individual liability to him, in the one case as executor and in the other as administrator.) After the allegations thus admitted, the plaintiffs proceed by stating that, before the notes became due and payable, the defendant, with intent to injure



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Dissenting opinion, per GRAY, C.

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and defraud Germain & Co., and to make the firm liable upon such indorsements, and with intent that they should be enforced against and collected of the firm, did, for a valuable consideration, transfer them to the New York and Erie Bank. The answer admits that for a valuable consideration the defendant indorsed and transferred the notes, before their maturity, to this bank, and does not deny that he did transfer them with intent that they should be enforced against and collected of the firm, but denies that he made the transfer with intent to injure the firm ; what less than an intent to injure is established by his admission that he transferred them to an innocent party, with intent that they should be enforced against and collected of the firm (*Cunningham v. Freeborn*, 11 Wend., 241, 253); or by the finding, "that he did indorse the notes to the bank *to put them in a shape* where the other parties could not defend against the indorsements? He knew that the legal effect of what he thus did would be to injure the firm, and that he was successful in accomplishing his object is established by the finding that, upon due proof of the indorsement and protest of the notes, the receiver of the assets of the firm, in pursuance of an order of the Superior Court of Buffalo, made in the month of March, 1863, paid the bank, out of such assets, the full amount of the notes; and thus it is established, by the admissions of the defendant and the findings of the judge, that the firm have been injured to the amount which the receiver has paid out of its assets. And by whom injured? Not by Rollin alone, who fraudulently placed upon the notes the firm name; but by the defendant, who not only concurred in the wrong (*Gansevoort v. Williams*, 14 Wend., 134, 138), but consummated the injury by putting the notes, as the judge finds, "in a shape where the other partners could not defend against the indorsements." It is not alleged in the answer that the defendant received the notes thus indorsed, relying upon the truth of any statement made by Rollin as to his authority to indorse upon them the name of the firm. That issue was not properly in the case; it was, nevertheless, made on the trial, and

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Dissenting opinion, per GRAY, C.

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that part of it which related to the defendant's reliance upon the truth of what Rollin said was sharply contested, and the judge did not find either way upon it, but did find what was some evidence of the fact, viz.: that when Rollin indorsed the notes he represented to the defendant that he was authorized so to do, and omitted to find the only contested fact, to wit, that the defendant, relying upon the truth of such representations, received the notes. Without considering whether, if he had thus found, it would amount to a defense, it is sufficient to say that the finding comes short of establishing the defendant's good faith in accepting the notes thus indorsed, but, as a whole, substantially finds the reverse. It is objected that the plaintiffs are not the owners of the cause of action, but portions of it belong to other members of the late firm of Germain & Co. The complaint states, and the answer does not deny, and therefore concedes, that in September, 1862, George W. Tift was, by the Superior Court of Buffalo, appointed receiver of the effects of the firm of Germain & Co.; that as such he became possessed of all the property and effects of the firm. It is then found, as a fact in the case, that on 28d April, 1863, pursuant to the order of the court conferring upon him his receivership, he paid the bank the full amount of the notes, which, as the judge elsewhere found, the defendant had indorsed to the bank "to put them in a shape where the other parties could not defend against the indorsement;" it was not until this payment that the cause of action against the defendant became complete, and, by its payment out of the assets of the firm, it became, for the benefit of the creditors of the firm, the property of the receiver, which, like any other asset of the firm, he had the right, under the order of the court, to sell and assign to whomsoever the court should direct, and the assignee would, as the plaintiffs did in this case, become vested, for their own benefit, of the entire interest which Tift had for the benefit of the creditors of the firm. The answer alleges that these indorsements were paid in pursuance of an agreement between the parties. The evidence

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Dissenting opinion, per GRAY, C.

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and finding is, that the payment was made in pursuance of the order of the court. It may be that the order was predicated upon the agreement, but it is not so found, nor is there, in the case, any evidence of it. Whether, if it was a fact, it should change the result is not a question for our consideration, nor was there a finding, or evidence to support one, that the debts of Germain & Co. were, before the assignment to the plaintiffs, or since, paid. The inference is almost, if not quite, irresistible that they were not paid before the assignment. If they had been, the court, unless imposed upon, would not have ordered it to be made. To the question as to the release of Rollin Germain under the agreement of the 7th of January, 1863, there are at least two answers; one is that the liability of the defendant, contingent or complete, belonged to the receiver for the benefit of the creditors of the firm, and, hence, that the firm could not, by discharging Rollin, if in their power then to do so, impair the liability of the defendant; that the receiver only could do that properly without the concurrence of the court. The other is that, on the 7th of January, 1863, the debt which Rollin incurred to the firm of Germain & Co. did not exist; it was not incurred until after the payment, under the order of the subsequent March, of his unauthorized indorsement. There is nothing in the pleadings or findings showing that Charles W. Grannis had any interest in the partnership property not vested in the receiver, or why he assigned to the plaintiffs all his interest in the property and assets of the firm of Germain & Co.; but upon looking into the evidence it will be seen that, on the 14th of June, 1862, short of a month after the making and indorsement of the note for \$304.90, and over a month prior to the making and indorsement of the note for \$101, Charles assigned to Henry his interest in the business of the firm of Germain & Co., without making any apparent change in the business of the company, Henry appearing there only as a subordinate; what effect the taking, holding and disposing of the firm property by the receiver, without an assertion of any

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Statement of case.

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interest in it by Henry, who seems to have been a dormant partner with knowledge of the acts of the receiver, may now be out of place to discuss; it is enough for the purpose of determining whether or not the judgment should be reversed, that Charles had no possible interest in the liability of Rollin, growing out of his indorsement of the note for \$304.90 not vested in the receiver. These views lead me to the conclusion that the judgment should be reversed and a new trial ordered.

For affirmance, EARL, HUNT and LEONARD, CC.

For reversal, LOTT, Ch. C., and GRAY, C.

Judgment affirmed.

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AMBROSE SNOW et al., Appellants, v. THE COLUMBIAN INSURANCE  
COMPANY, Respondent.

Warranties in a policy of insurance must be strictly and perfectly complied with; this strict compliance, however, operates in favor of as well as against the assured when he brings himself within the terms thereof.

A warranty in a policy of marine insurance not to use a certain port means not to go into it. Going near or in the direction of the prohibited port is not a breach of the warranty, and this is so although the vessel was approaching with intent to enter the port. The fact, and not the intent, gives the legal character to the transaction. Where, therefore, a vessel covered by a policy containing such a warranty, while sailing toward the prohibited port with intent to enter it, is lost before reaching it, there is no breach of the warranty and the under-writers are liable.

(Argued January 10, 1872; decided May term, 1872.)

APPEAL from order of the General Term of the Supreme Court in the first judicial district, setting aside a verdict in favor of the plaintiff and directing a new trial. The action is upon a policy of marine insurance.

Plaintiffs were copartners under the firm name of Snow & Burgess

On the 9th day of September, 1864, in consideration of the

## Statement of case.

premium of \$660, the defendant made and delivered to the plaintiffs its policy of insurance, by which the defendant insured the plaintiffs for \$6,000 upon the schooner *Caspian*, then owned by the plaintiffs and lying in the port of Boston, Massachusetts, from the 8th day of September, 1864, at noon, until the 8th day of September, 1865, at noon. The policy contained the following clause :

“Warranted not to use ports on the continent of Europe north of Hamburg, nor to go east of Navarino in the Mediterranean, during the period insured ; nor ports on the continent of Europe north of Antwerp between first November and first March ; nor ports in the British North American provinces, except between the fifteenth day of May and fifteenth day of August ; also, warranted not to use the West India Islands during the month of August and September ; also, warranted not to use ports and places in Texas, except Galveston, nor foreign ports and places in the Gulf of Mexico, nor places on or over Ocracoke bar ; nor any of the West India salt islands ; nor ports or places on the west coast of America, north of Benicia, during the period insured ; nor to use the Min river, nor Torres Straits.”

On the 20th of September, 1864, said schooner sailed from Boston in ballast and stores, bound for the port of Langan, in the island of Cape Breton, in the province of Nova Scotia, one of the British North American provinces, for the purpose of taking in a cargo of coal. The vessel proceeded on her voyage, and on the night of the twenty-fourth of September was wrecked and totally lost on the coast of the Island of Cape Breton, within sight of the Louisburgh light on said island, and about fifty miles from said port of Langan.

The defendant's counsel moved for a dismissal of the complaint, upon the ground that the warranty in the policy not to use ports in the British North American provinces, except between the fifteenth May and fifteenth August, having been violated, the plaintiffs were not entitled to recover.

The court refused the motion, and ordered a verdict for the plaintiffs for \$5,782.33.

## Statement of case.

Exceptions were ordered to be heard at first instance at General Term.

*Richard H. Huntley* for the appellants. The vessel was not using a prohibited port when lost. (1 Duer on Ins., 16, § 15; *Teaton v. Fry*, 5 Cranch. R., 335; *Palmer v. The Warren Ins. Co.*, 1 Story R., 362; *Notman v. The Anchor Ins. Co.*, 4 J. Scott R. [N. S.], 470.) An intent to violate the warranty does not constitute a breach. (1 Parsons on Ins., 487, note; *Middlewood v. Blakes*, 7 T. R., 168, opinion of LAWRENCE, J.; *Tasker v. Cunningham*, 1 Bligh. P. C., 99; *N. Y. Fireman's Ins. Co. v. Lawrence*, 14 Johns., 46; *Marine Ins. Co. v. Tucker*, 3 Cranch., 357; 2 Pars. Mar. Ins., 39; 1 Phil. Ins., §§ 937, 1001.) The precise import of the words used in the warranty, not the presumable purposes or probable intent, controls in *Notman v. The Anchor Ins. Co.* (4 J. Scott [N. S.], 470), and as in 2 Bing. N. C., 383; 2 Maule. & S., 111; 2 Taunt., 423.

*Dudley Field* for the respondent. Contracts are to receive such an interpretation as will give every stipulation reasonable effect. (*Ward v. Whitney*, 8 N. Y., 446; *Decker v. Furniss*, 14 id., 622; *Hamilton v. Taylor*, 18 id., 358; *Richards v. Waring*, 39 Barb., 42; *James v. Tallent*, 5 Barn. & Ald., 889.) If there is doubt, the clause is to be interpreted as the insured had reason to believe the insurer understood it. (*Barlow v. Scott*, 24 N. Y., 40.) The clause is to be construed most strongly against the insured. (2 Parsons, 5th ed., 506.) A voyage to and an intent to enter a prohibited port was a breach, and, whether material or not, exonerates the insurer. (2 Par. Mar. Law, 104; *Newcastle Ins. Co. v. Macmoran*, 3 Den., 225; *Blackhurst v. Cockell*, 3 Term., 360; *De Hahn v. Hartley*, 1 id., 343; 2 id., 186; *Forbes v. Church*, 3 Johns. Cas., 159; *Tasker v. Cunningham*, 1 Bligh., 87; *Woolridge v. Boydell*, 1 Doug., 16; *Way v. Modigliani*, 2 Term. Rep., 30; *Stocker v. Harris*, 3 Mass., 409; *Sellar v. Mc Vicar*, 1 Bos. & Pul. N. R., 23;

*Marine Ins. Co. v. Stras*, 1 Munf., 408; 2 Pars. Mar. Law, 209.)

HUNT, C. Warranties must be strictly and perfectly complied with. (Phil. Ins., § 762.) It is not enough that they be substantially complied with. (Id.) The compliance must be full and complete, through not necessarily literal. (Id., § 762, 766.) Mr. Justice KENT said, in *Kemble v. Rhinelanders* (3 John. Cas., 130), that "a warranty must be literally complied with, but this strict compliance ought to operate in favor of as well as against the assured whenever he can bring himself within the terms of it." In the case of a warranty that "the ship should have twenty guns," and she had, in fact, twenty-two guns, but only twenty-five men, a number short of the necessary complement for twenty guns, there being no ground to impute fraud, Lord MANSFIELD held this to be a compliance with the warranty, and that the assured was entitled to recover. (*Hyde v. Bruce*, Marsh, 347; 3 Dougl., 213, cited; 1 Phil. Ins., § 767.)

That the assured have literally complied with and kept their warranty in this case can scarcely be doubted. A vessel cannot be said to have used a particular port when it is conceded that she has not been within fifty miles of it.

"To use," means to employ, to hold, to occupy, to enjoy, or take the benefit of, as a chair, a book, or possess a harbor. In connection with the word "port," it means to go into a harbor or haven for shelter, for commerce or for pleasure, and to derive a benefit or an advantage from its protection. Going near a harbor or port, sailing past or going in the direction of it, is not a use of the port. Certain ports, it is declared in the warranty, shall not be used, as those on the continent of Europe north of Hamburg, nor ports in the British North American provinces, except at certain dates, nor the West India Islands at certain dates, nor certain ports of Texas, etc. That this exclusion refers to places specifically, and not to the regions adjacent, is evident, from the fact that, as to Navarino in the Mediterranean, the exclusion

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Opinion of the Commission, per HUNT, C.

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is directed in form to the region as distinguished from the port. It is stipulated in that case, without reference to ports or places, that the vessel shall not "go east of Navarino in the Mediterranean during the period insured." If the vessel shall go east of that port, whether she enters any or all the ports thereabouts, or returns having entered no port, the warranty is broken. As to Texas, again, the warranty is peculiar, "not to use ports and places in Texas except Galveston." The region is not excluded. One port is not excluded. All other ports are excluded, and the entry into any one of them, except Galveston, would constitute a breach of the warranty. The distinction between traversing a region and entering into a port or harbor in the region, was evidently in the view of the contracting parties. This is an answer to the argument "that it was the clear intent of the underwriter, in this restriction, to guard against the danger which arises from navigating near the coast of the British provinces at certain seasons of the year." The language is singularly unfortunate to embrace such a proposition. It imports that, in certain latitudes, the regions were, themselves, deemed to be dangerous, and that the vessel must not enter those regions; that in other latitudes the underwriters had no fears of the region, provided the dangers of using certain harbors or ports were avoided. To meet the case, certain ports in the north of Europe and on the British North American coasts are excluded, the region being open for use, while in the Mediterranean and in the Gulf certain regions must not be entered by the vessel.

The defendant insists again that an intention to enter the prohibited port creates a breach of the warranty. I cannot concur in this argument. No authority is cited to sustain it, and it is against all principle. In the matter of performing contracts, except on some nice points of deviation, the intention is not usually important. It is the act or fact by which the result is determined. A man may determine to violate his contract or to defraud his neighbor a thousand times, and in a thousand ways, and yet not place himself within the



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Opinion of the Commission, per HUNT, C.

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reach of the law. He may perform his contract when he intends to violate it. If his acts are right, a secret bad intent cannot injure him; nor, if his acts are wrong, can a good intent save him. If the assured intended to go to some other port in Texas than Galveston, but in fact went directly to Galveston, and the vessel was lost while in that port, there would be no breach of her warranty. But if her master voluntarily carried his vessel east of Navarino in the Mediterranean, although he did not intend to go east of that port, and did not know that he had done so, his warranty would be broken. In such case the fact and not the intent to keep the warranty or to violate it gives the legal character to the transaction. (2 Pars. Mar. Law, chap. 3, § 1.) When the question is one of deviation, the point of when and where the departure commences may be important. The point here is upon the warranty not to enter a certain port, and is not a question of deviation.

The case of *Stevens v. The Com. M. Ins. Co.* (26 N. Y., 397) is cited by the respondent. In that case the vessel was "warranted not to use ports or places in Texas, except Galveston, nor in the Gulf of Mexico." Permission was afterward given "to use the port of Laguna for her voyage, without prejudice to this insurance." The vessel arrived at Laguna, but did not enter that port. It not being a port of entry, the custom-house officers would not permit the entry. She then sailed for Sisal, for the purpose of paying the duties, and intending to return to Laguna for her cargo. At Sisal she went ashore and was lost. The Court of Appeals held that the entry at Sisal was not justified, and that the warranty was broken. I should say that the real question in that case was whether the permission to enter the port of Laguna carried with it the power to take all measures necessary to effect that purpose, or whether the permission was to be literally construed. At any rate, the case bears no analogy to the one we are considering.

In my opinion there was no breach of warranty by the assured. The order of the General Term should be reversed,

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Opinion of the Commission, per EARL, C.

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and the plaintiffs should have judgment on the verdict, with costs.

EARL, C. The only question in this case arises out of a warranty in the policy that the vessel should not "use ports in the British North American provinces, except between the 15th day of May and the 15th day of August." On the 20th day of September, 1864, the vessel sailed, bound for the port of Lingar, in the Island of Cape Breton, in the Province of Nova Scotia, one of the British North American provinces, for the purpose of taking in a cargo of coals, and while on her way, and before reaching the destined port, she was wrecked on the coast of the Island of Cape Breton, about fifty miles from said port.

Precise and definite language is used in the policy in reference to the warranty, and if it had been intended to prohibit the vessel from sailing along or near the coast of the British North American provinces, the prohibition would probably have been inserted in apt and proper language. The underwriters deemed it sufficient to prohibit the *use* of the forbidden ports, and we cannot give the language used a broader signification than its ordinary and plain meaning requires. If, after applying the ordinary canons of construction, the meaning remains in doubt, the doubt must be construed against the underwriters who wrote the policy and adopted the language which creates the doubt.

To sail toward a port, and to come within fifty miles of it, is not, within any sense of the term, to *use* it. This is not claimed; but it is claimed that the *intention to use* is as much a violation of the policy as the actual *use* of the port. This claim is not founded in reason or authority. A mere intention to violate a policy can never have the effect of an actual violation. The vessel, at the time of her loss, was not sailing in forbidden waters, and so long as she had not actually reached a forbidden place, the unexecuted intention to reach one cannot avoid the policy. (*N. Y. Fire Ins. Co. v. Lawrence*, 14 John., 46; *Marine Ins. Co. v. Tucker*, 3 Cranch., 357.)

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Statement of case.

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Order of General Term reversed, and judgment for plaintiffs upon the verdict, with costs.

All concur. LEONARD, C., not sitting.

Order reversed, and judgment for plaintiffs upon verdict.

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GEORGE BRISBANE, Respondent, v WELCOME R. BEEBE,  
Appellant.

Where A. loans his note to B., upon the strength of C.'s promise that he will get it discounted and renewed from time to time until B., shall be able to meet it, C. is bound by the promise and A. can maintain an action against him thereon. But such a promise carries with it an implication, both that A.'s note shall be furnished for renewal before the one discounted becomes due, in season to be substituted therefor, so as to save C.'s indorsement from dishonor, and that in the event of B.'s ability to pay the note when due the obligation to procure a renewal shall cease. The neglect of B. to furnish a new note in time for renewal, or the ability of B. to pay, discharges C. from liability.

(Argued January 10, 1872 ; decided May term, 1872.)

APPEAL from the judgment of the General Term of the Supreme Court in the eighth judicial district, in favor of plaintiff, entered upon an order denying motion for a new trial and directing judgment upon the verdict, provided plaintiff stipulates to make a deduction therefrom.

On the trial it appeared that, shortly prior to June 22, 1860, one Charles E. Birdsall applied to the defendant for a loan of \$500, which the defendant declined to make, but on that day addressed to the wife of Birdsall a note, in which he stated that if she or her husband would bring him the plaintiff's note for that sum, he would get it discounted for her husband's benefit from time to time till her husband was able to meet it; upon the strength of this promise by the defendant, the plaintiff made his note for the amount stated, payable to the order of Mrs. Birdsall, who took it to the defendant, who indorsed and procured it to be discounted; when this note

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Statement of case.

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became due Birdsall was perfectly able to pay it, but did not, nor did any one furnish to the defendant a note with which to renew it, and it was protested and charged to the defendant's account. Some days afterward, Mrs. Birdsall went to the defendant with a second note made by the plaintiff, payable to the defendant's order, and prevailed upon him to take it and try to get it discounted. On that occasion the defendant took up and returned to Mrs. Birdsall the plaintiff's first note, and, failing to get the second discounted, he carried it until it matured. No note being furnished with which to renew it, it was protested and left for collection. As to the ability of Birdsall then to pay, nothing appeared, except that it was inconvenient for him to do so. Some days subsequent to the maturity of the second note Birdsall called upon the defendant, with the plaintiff's third note for the same amount, which, at Birdsall's solicitation, he took and gave up the second note, and failing to get the third note discounted, he transferred to a party to whom he was indebted. When this note became due Birdsall was pecuniarily responsible and able to pay it; he testified he would have done so if he had been able to attend to business. After the third note had laid under protest some time, Birdsall called upon the defendant with the plaintiff's fourth note for the same amount; solicited him to raise money upon it and take up the third note. This the defendant made an effort to do, but, failing to get it discounted, erased his indorsement from it and returned it to Birdsall. The plaintiff proved that he was prosecuted by the holder of the third note, and a recovery had against him for \$519, the amount and interest due upon it, and \$116 costs; and, to repel the evidence of Birdsall's ability to pay the note, testified, as a witness in his own behalf, that Birdsall was not worth a dollar, but, upon cross-examination, admitted that he knew nothing about Birdsall's pecuniary responsibility, except what he had heard Birdsall's wife say. Upon this evidence the defendant moved, upon numerous grounds, that the complaint be dismissed, two of which were, in substance, that no note of the plaintiff had

## Statement of case.

been furnished the defendant with which to renew a previous one until the previous note had been dishonored; and second, that the event had occurred when the note sued upon became due, up to and until which he had agreed to get the note renewed, viz., the ability of Birdsall to meet it. The motion was overruled. The defendant excepted, and thereupon the court charged the jury that the plaintiff was entitled to recover the \$519 damages and \$116.03 costs and interest, to which the defendant also excepted. The jury rendered a verdict in accordance with the charge for \$812.05. The case and exceptions were ordered to be heard at General Term, and were so heard. Judgment was ordered upon the verdict, provided the plaintiff would deduct therefrom the \$116.03 costs, which, being deducted, judgment was entered accordingly.

*E. Cooke* for the appellant.

*A. N. Weller* for the respondent. The letter of defendant constituted a valid contract. (*Judson v. Gray*, 17 How., 289, 298; *Lawrence v. Fox*, 20 N. Y., 268; *Baker v. Bucklin*, 2 Denio, 45; 15 Abbott's, 280; Story on Cont., §§ 431-433; *Miller v. Drake*, 1 Cow., 45.) In interpreting contracts, the court may look at the surrounding circumstances and the pre-existing relations between the parties. (*Blossom v. Griffin*, 13 N. Y., 569; *Connell v. Taylor*, Seld., note 2, p. 23; *Hasbrook v. Paddock*, 1 Barb., 685; *Auburn City Bank v. Leonard*, 40 id., 119; *Bankcroft v. Winspear*, 44 id., 209.) The literal or grammatical sense is not to be adhered to, either in will or deed, when a contrary intent is apparent. (*White v. Barber*, 5 Burr., 2702; *Northrop v. R. P. Ins. Co.*, 43 N. Y.; *Jackson v. Blanchard*, 6 John., 54; *Jackson v. Topping*, 1 Wend., 388; *Roome v. Phillips*, 24 N. Y., 463; Cro. Eliz., 525, and Moore, 422; *Pond v. Berg*, 10 Paige, 46; *Barker v. Sureties*, 2 Str., 1175; *Fairfield v. Morgan*, 5 Bos. & Pul., 38; *People v. Utica Ins. Co.*, 15 John., 381; *Du Bois v. Ray*, 35 N. Y., 162.) In *Decker v. Furniss* (3

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Opinion of the Commission, per GRAY, C.

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Duer., 309), the court say: "The real intent of the parties is not to be sacrificed to the literal interpretation of the words that may happen to be used." (See, also, 5 Duer, 336.) "Intention must govern." (*Mason v. Jones*, 2 Barb., 229; *Hearl v. Case*, 23 How., 546; 1 Paige, 331; 3 id., 9.) When defendant failed to get the note discounted it became void, and should have been returned; the transferring it in payment of an antecedent debt was a fraud, for which defendant is liable. (*Kasson v. Smith*, 8 Wend., 437; *Murray v. Burleigh*, 10 John., 172; 5 Wend., 566; *Rochester v. Taylor*, 23 Barb., 18; 3 Wend., 415; *Decker v. Mathews*, 12 N. Y., 313, *et seq*; *Dunniston v. Bacon*, 10 John., 198.)

GRAY, C. The agreement of the defendant to see that the plaintiff's note was renewed from time to time till Birdsall should be able to meet it, carried with it an implication, not only that the plaintiff's note for renewal should be furnished in season to be substituted for the previous note, in order to save it, with the defendant's indorsement, from dishonor, but an implication that, in the event of Birdsall's ability to meet, or, in other words, pay the note, the obligation of the defendant to procure a renewal should cease. It is quite clear that after the dishonor of the first note, the defendant was not bound to see to it that a second was discounted or substituted for it; when the second note became due it was paid by the defendant; he, therefore, as between him and the plaintiff, had the right to the avails of the note given as its substitute (the second being canceled), to pay it to whomsoever he pleased, or to procure it to be discounted by a bank or his creditor. Transferring it to a creditor in payment of a debt was the equivalent, and nothing more or less than procuring it to be discounted by the creditor to whom it was transferred, and the most the defendant was bound to do in the event of Birdsall's being unable to pay it, was, if a new note was seasonably furnished, to see to it that the note discounted by his creditor was renewed, or that he should himself discount the note offered as its substitute; no

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Opinion of the Commission, per LEONARD, C.

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such note was seasonably presented, and hence the defendant's obligation to procure it to be discounted, or discount it himself, was at an end. But upon the other ground, the action was well defended; Birdsall was able to pay the note, at its maturity, upon which the plaintiff was sued; the statement of the plaintiff that Birdsall was not worth a dollar, was made without knowledge sufficient to justify it, as he admitted on his cross-examination, when he said he knew nothing about his pecuniary responsibility except what Birdsall's wife had told him.

The judgment appealed from should be reversed.

LEONARD, C. There is nothing in the defendant's letter of October 22d, 1860, which justifies the assumption by the court that he intended to make any agreement with the plaintiff, or authorized or expected it to be shown to him. It appears to be a friendly, personal and confidential letter from the defendant to a near relative—the wife of his nephew. Nor does the evidence justify the assumption made by the court that the letter of the defendant could be construed as an engagement with the plaintiff.

The evidence of the plaintiff, that Mrs. Birdsall had told him that the defendant had authorized her to show the letter to him, was of no consequence. It was hearsay, merely. That of Mr. Weller, that the defendant told him he had given the letter to Mrs. Birdsall to be given by her to the plaintiff, was flatly contradicted by the defendant. It became, then, under the most favorable aspect of the case for the plaintiff, a question of fact for the jury. If the defendant authorized the letter to be shown to the plaintiff, I think there would then be no doubt that it might be considered as an agreement with him.

The case of *Scott v. Pilkington* (15 Abb. Pr. R., 280) would then be an authority in point. The referee in that case found that the letter of the defendant was written for the purpose and with the intention that it should be exhibited to the plaintiff. The General Term affirmed the judgment

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Statement of case.

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expressly upon the fact so found. That was the fact which bound the defendant as upon a promise to the plaintiff.

The other cases relied on by the plaintiff (*Judson v. Gray*, 17 How. Pr. R., 289; *Lawrence v. Fox*, 20 N. Y., 268; *Barker v. Bucklin*, 2 Denio, 45) have no application in principle to the case presented here. Those cases are express promises by the defendant to pay his own debt, on a consideration proceeding from a third party to the plaintiff.

The court, in the present case, considered the letter as an undertaking by the defendant with the plaintiff, and refused to hold with the second request of the defendant, that the plaintiff had no right of action on the instrument declared on, but instructed the jury that the plaintiff was entitled to recover as matter of law. The defendant's exceptions to these rulings were well taken.

I think, also, that it was a part of his case for the plaintiff to prove that Mr. Birdsall was unable to pay, and that it was error to refuse the sixth request of the defendant, relating to that subject. There was affirmative evidence that he was able to pay, and none of a legal character to the contrary.

In my opinion, too, the plaintiff was required, by the terms of the letter, if it be considered that a case was made of a probable intention on the part of the defendant to contract with the plaintiff, to furnish the defendant with a renewal note before the former one became due.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

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BURTON G. MORSE, Appellant, v. PHILANDER K. SALISBURY,  
Respondent.

Where, in an action of trespass, defendant claims title to the *locus in quo* by adverse possession, the declarations of a former occupant under whom defendant claims are admissible as evidence, to characterize his possession as adverse to any title of the plaintiff; and this is competent under a general plea of title, without allegations that title is claimed by adverse possession.



## Statement of case.

A written instrument not under seal is inoperative and ineffectual to pass the legal title to lands.

Where an agreement is executed in duplicate, if there are variances between the two instruments, they are to be construed together in determining the meaning of the parties. One cannot be regarded as more expressive of the intent of the parties than the other, but they are entitled to equal faith and credit. The want of accuracy in the one is not proven by the mere production of the other. The intent is to be arrived at by an examination of the terms and provisions which are identical in each, thus determining the objects and purposes contemplated. And where the contract bears such inherent evidence of its true meaning that it carries a clear legal conviction, evidence of the intention of the parties or of surrounding circumstances is properly excluded.

Plaintiff claimed a title under a contract executed in duplicate between M. & Co. (of which firm plaintiff was a member) and B. The instrument delivered to M. & Co. purported to convey to them "all the *land* and timber, except the hard wood, on one hundred acres of land;" in that delivered to B. the words were "bark and timber;" aside from this the two were identical. The scope and tenor of the contract indicated that the land itself was not intended to be conveyed. *Held*, that the title of B. to the land was not divested, and that the possession of plaintiff was subordinate thereto. Also, that evidence that the price paid by M. & Co. was the full value of the land, bark and timber together, except the hard wood, was immaterial, and its exclusion no error.

In an action of trespass in Justice's Court, defendant pleaded title to a portion of the premises; that action was thereupon discontinued and one commenced in the Supreme Court, wherein the pleadings were substantially the same. Defendant succeeded on the issues affecting the premises as to which title was pleaded. Neither possession of nor title to the residue was made a question upon the trial by defendant, and the amount of the recovery for trespass thereon was less than fifty dollars. *Held*, that under section 61 of the Code, the costs in such case are to be governed by the decision and judgment on the issue presented by the plea of title; that plaintiff, by claiming title to land not owned by him, caused all the costs which accrued in the Supreme Court; he, therefore, could not recover costs, but was properly chargeable with defendant's.

(Argued January 10, 1872; decided May term, 1872.)

**APPEAL** from judgment of the General Term of the Supreme Court in the third judicial district, affirming a judgment in favor of plaintiff, entered upon the decision of the court upon the trial, without a jury, at the circuit.

An action was originally commenced before a justice of the peace, for trespasses alleged to have been committed by

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Statement of case.

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the defendant upon two different parcels of lands of the plaintiff, in Greene county, one called the tavern-stand premises, first described in the complaint, and the other the 100-acre lot secondly described therein.

The defendant denied the allegations of the complaint, and also interposed a plea of title to a specific portion of the premises first described, and to the whole of the lot secondly described therein, and delivered to the justice the undertaking required by law to deprive him of jurisdiction, on the issue on the question of title.

Thereupon that action was discontinued, and this was commenced in the Supreme Court for the same cause of action, and the pleadings therein were substantially the same as those before the justice.

The issues were tried before Justice MILLER, without a jury (a jury having been waived by the parties), and he, after hearing the allegations and proofs of the parties, found in favor of the defendant on the question of title, and as to the acts complained of as trespasses on the land covered by the plea of title, and in favor of the plaintiff as to the trespasses alleged to have been committed on the part of the tavern-stand premises, to which the plea of title was not interposed, and awarded damages against the defendant to the amount of six cents.

The judge also found that neither the possession nor the title of the plaintiff to the portion of the premises on which the said trespasses were committed for which the plaintiff recovered said damages, was made a question or controverted on the trial, and therefore he decided that the defendant was entitled to recover his costs of the action.

Exceptions were taken by the plaintiff to the decision of the said justice, adversely to him on the question of title and as to the recovery of costs.

Some exceptions were also taken during the progress of the trial, on the admissibility of evidence which, so far as they are material to the decision in this court, are sufficiently referred to in the opinion of the chief commissioner.

## Statement of case.

*A. J. Parker* for the appellant. Plaintiff's title to the land under the instrument dated April 22, 1839, was good. (3 R. S., 5th ed., 59; 1st ed., vol. 1, 762.) Defendant was a trespasser. (4 Wend., 645, 646; 7 J. R., 1; 9 id., 35, 331; 7 Cowen, 229.) Several written instruments executed at the same time, between the same parties, and relating to the same subject-matter, should be construed as forming parts of a single contract or conveyance. (*Cornell v. Todd*, 2 Den. R., 130; *Jackson v. Dunsbagh*, 1 Johns. Cas., 91; *Stow v. Tiff*, 15 Johns. R., 458; *Rawson v. Lampman*, 1 Seld., 456.) The construction must be made upon the whole instrument, and if possible every word must be made operative. (*Jackson ex dem. Troop v. Blodget*, 16 Johns. R., 172; *Whallon v. Kauffman*, 19 id., 97; *Moore v. Jackson*, 4 Wend. R., 58.) The court has no right to assume that word "land" was inserted in plaintiff's instrument by mistake and therefore disregard it, especially when the answer contains no such defence. (*Cornell v. Todd*, 2 Den. R., 134, opinion of the court; *Coon v. Knap*, 4 Seld. R., 402, 405, opinion of the court; *Kent v. Manchester*, 29 Barb., 597; *Wemple v. Stewart*, 22 id., 158; Story's Eq. Jur., §§ 152, 155-157; 2 John. Ch., 595, 597.) Defendant's answer not setting up adverse possession, evidence to prove it was inadmissible. (*Jackson v. Vandeburgh*, 1 John. R., 159; *Jackson v. Mc Vey*, 15 id., 234; 30 Barb., 183; 20 N. Y., 400; 6 Hill, 407; 16 John., 302; 6 Cowen, 751.) Plaintiff was entitled to judgment for costs. (*Utter v. Gifford*, 25 How. Pr., 289; Code § 304.) A plea of not guilty in trespass on land puts the title in issue. (*Dunkel v. Farley*, 1 How. Pr., 180; *Van Buskirk v. Irving*, 7 Cow., 35.)

*James B. Olney* for the respondent. The findings of fact of the court below, as such, cannot be questioned here. (*Mann v. Whitbeck*, 17 Barb., 388.) The agreement of the 22d of April, 1839, for want of a seal, was, as a conveyance of real estate, inoperative and void. (3 R. S., 5th ed., 29; 4 Kent's Com., 8th ed., 499, 500; 2 Black. Com., 310; *Jack-*

## Statement of case.

*son v. Wood*, 12 John., 73; *Same v. Wendell*, id., 355; *People v. Gillis*, 24 Wend., 201. See Edmonds' ed. R. S., vol. 1, p. 689; 1 Shep. Touchstone, 50 id., 56; Plowden's Com., 308; 1 Barb., 542.) Plaintiff's possession was not such as entitled him to maintain an action for trespass. *Stuyvesant v. Tompkins*, 9 John., 60, 62; *Wichham v. Freeman*, 12 id., 183; *Holmes v. Seeley*, 17 Wend., 75; Cow. Treatise, title Trespass; 1 Wait's Law and Pr., 766, 767; Chitty's Pleadings, title Trespass to Real Property; Gould's Pleadings, 4th ed., 43; id., 42, 43, notes by Geo. Gould; *Hall v. Hodskins*, 30 How., 27, opinion of court; *Van Leuwen v. Lyke*, 1 Com., 515; *Houghtaling v. Houghtaling*, 35 Barb., 379; *Haight v. Badgley*, 15 id., 499; 4 Den., 127.) The agreements should be regarded as one instrument and construed together. (*French v. Cahart*, 1 Com., 96, 102, and cases cited; *Springsten v. Samson*, 32 N. Y., 703; *Bancroft v. Wenspear*, 44 Barb., 209; *Mann v. Whitbeck*, 17 id., 388; *Cornwell v. Todd*, 2 Denio., 130; *Draper v. Snow*, 20 N. Y., 331; *Britannia Co. v. Zingsen*, 4 Rob., 312; *Morris v. Jacobs*, 35 How., 90; *Jackson v. Blodget*, 16 John., 119; *Jackson v. Erwin*, 4 Wend., 69.) The clause as to the land must be construed strictly against plaintiff. (1 Daily, 471; *Sears v. Shafer*, 1 Barb., 408, 415.) The plaintiff had acquired no rights whatever, by adverse possession. (See numerous cases in Abbott's Digest, vol. 1, p. 38, §§ 9 to 24.) To recover in an action of trespass the plaintiff must be in possession of the premises. (See cases hereinbefore cited; *Wood v. City of Williamsburgh*, 46 Barb., 601; *Cowenlaven v. City of Brooklyn*, 38 id., 9; *Little v. Denn*, 34 N. Y., 454, opinion of the court; 1 Cow. Tr., 3d ed., 414-418; Code, § 81; 2 R. S., Edmonds' ed., 305.) Defendant's possession has been full, absolute, unequivocal and hostile to the claim of all other persons. (*Miller v. Platt*, 5 Duer, 273; opinion of the court, 277, and cases cited; *Northrup v. Wright*, 7 Hill, 477; opinion of the court, 488; *Jackson v. Norton*, 18 John., 355; Code, §§ 81, 83; *Doolittle v. Tice*, 41 Barb., 181. See also 1 Abbott's Dig., 38, and cases there cited; *Crary v. Goodwin*, 22 N. Y., 170; *Kellogg*

Opinion of the Commission, per LOTT, Ch. C.

v *Valentine*, 21 How., 226; *Kent v. Harcourt*, 33 Barb., 491; *Downing v. Miller*, id., 386; *Mosher v. Yost*, id., 277; *Jackson v. Vermilyea*, 6 Cow., 677; *Jackson v. Bowen*, 1 Caines, 358.) Defendant is entitled to costs. (Wait's Code, § 62; *Shull v. Green*, 39 Barb., 311; 34 How., 418; *Morss v. Jacobs*, 35 id., 90; *Burhans v. Tibbets*, 7 How., 54; *Niles v. Lindsley*, 8 How., 131; S. C., 1 Duer, 610; *Ashley v. Marshall*, 19 How., 110; *Rathbone v. McCarmell*, 20 Barb., 311; S. C., 21 N. Y., 466; Voorhies' Code, 1866, pp. 592, 593, and cases cited; *William v. Prier*, 53 Barb., 442; *Little v. Denn*, 34 N. Y., 457; *Heintz v. Dellinger*, 28 How., 39; *Hastings v. Gleno*, 1 E. D. Smith, 402.) Evidence of the declarations of a former occupant proper to characterize his possession. (*Jackson v. McVey*, 15 John., 234; *Jackson v. Sherman*, 6 id., 21; *Jackson v. Van Deusen*, 5 id., 144; opin. of court, 167; *Jackson v. Murray*, Anthon N. P., 143; 1 Greenleaf Ev. § 109; 1 Halsted Ev., 441, 453; *Burlingame v. Robbins*, 21 Barb., 327; *Jackson v. Vredenburg*, 1 John., 159; *Morss v. Jacobs*, 35 How., 90; 1 Cow. & Hill's Notes, 3d ed., 217-221; 1 Halsted Ev., 352, 427.)

LOTT, Ch. C. The defendant, in support of his plea of title to the premises first described in the complaint, introduced a deed bearing date the 25th day of May, 1816, from Jacob Haight, sheriff of the county of Greene, to John Brandow, of a tract of land containing sixty acres, more or less, which had been sold by him under an execution issued out of the Supreme Court, on a judgment recovered by Elisha Williams against David Swart.

There was testimony showing that Swart was in possession at the time of the sale of a portion at least of the premises so sold and conveyed, and there was conflicting evidence on the question whether John Brandow and his devisees, under whom the defendant claimed, had been in possession, exercising acts of ownership from and subsequent to the sheriff's sale and conveyance, and by virtue thereof over the premises covered by the defendant's plea of title.

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Opinion of the Commission, per LOTT, Ch. C.

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The finding of the judge, that the defendant and those under whom he claimed title, and not the plaintiff, had title thereto, was necessarily based on the decision of that controverted question of fact in favor of the defendant. That decision having been affirmed by the General Term is conclusive on this court.

The declarations of Brandow which were objected to were admissible to characterize the possession of the defendant as adverse to any title of the plaintiff, and it was sufficient to justify its admission that the defendant had pleaded title generally without showing that it was claimed or held by adverse possession.

It follows, from the views above expressed, that there is no ground for the reversal of the judgment so far as it relates to the premises first described in the complaint. We will now consider whether the decision, as to the second or the 100-acre lot, is erroneous.

It is conceded that John Brandow, on the 22d day of April, 1839, was the owner of the said lot and in possession thereof, claiming title.

On that day two instruments in writing between him and B. G. Morss & Co., of which firm the plaintiff was a member, were executed, one of which was delivered to each party. That given to Morss & Co., and under which plaintiff claims title, was, so far as it is material to present the ground of his claim, as follows: "Memorandum of an agreement made and entered into this twenty-second day of April, eighteen hundred and thirty-nine, between John Brandow, Esq., of the first part, and B. G. Morss & Co. of the second part, all of the town of Prattsville, Greene County, New York, witnesseth, that the said party of the first part has and does, this day, grant, bargain, sell and set over to the said party of the second part all the land and timber, except the hard wood on the 100 acres of land situated in the town and county above-named, bounded on the north by the Hardenburgh line, on the east by lands of Z. Pratt & Co., on the south by the so-called Myers lot, on the west by the lands of Lucas Elmen-

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Opinion of the Commission, per LOTT, Ch. C.

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dorf." It then provided that, "in consideration of the above," the said party of the second part should pay unto the said party of the first part thirteen shillings and sixpence "per cord for every cord of bark, peeled on the same," and interest on the same from the date of the instrument.

That the sum of \$1,500 on account of the above bark should be paid as soon as the first day of December next after its date, if the party of the first part wished it, and the balance was to be paid yearly as the party of the first part wished, "and as the bark and timber" were taken off, together with the interest annually. Then followed these provisions: "The party of the second part are to have the immediate possession of the land for the purposes above stated and what time they choose to take the same off. Also, the right of crossing the lands belonging to the party of the first part for the purpose of passing to and from the above-named lot. It is understood between the parties that the party of the first part is to receive annual interest on the whole amount of bark peeled or taken off from the lot from this date; the party of the second part to run all risks of fire after two years."

The instrument delivered to Brandow was the same in all respects, except that, in the clause disposing of the property sold, the word "bark" was used instead of "land" before the words "and timber," thus purporting to sell and convey all the bark and timber, etc.

Each of the instruments was subscribed by the parties thereto, but the seal of neither of them was affixed, and the question is presented whether the plaintiff acquired any right or interest under them in the land itself, and my conclusion is that he did not, for the following reasons:

1st. Assuming that the instrument delivered to him is to control the right of the parties, it did not pass the legal title. It was not under seal and was therefore inoperative and ineffectual for that purpose. Without reference to the rules of the common law, it is sufficient to say that it is declared by the Revised Statutes that "every grant in fee or of a freehold estate shall be subscribed and sealed by the person from

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Opinion of the Commission, per LOTT, Ch. C.

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whom the estate or interest conveyed is intended to pass, or his lawful agent." (1 Rev. Stat., p. 738, § 137.)

The provision cited by the plaintiff's counsel from 1 Rev. Stat., p. 762, § 38, has application only to the meaning of the term conveyance, as used in the chapter providing for the proof and recording of conveyances of real estate, and declaring what instruments are included under it for the purpose of record.

2d. The two instruments are to be construed together in determining the meaning of the parties thereto. They were executed at the same time, and were intended to be duplicates expressing the same terms and language, and one cannot be regarded as more expressive of and delaring the intention of the parties, nor needing reformation to declare that intention, than the other. On examining them together, and the terms and provisions which are the same and identical in each, there is no reasonable ground for believing that a sale and conveyance of the land itself was contemplated. The language used is inapt and inappropriate to carry out that object. It, as used in the instrument delivered to the plaintiff, conveys "all the land and timber, except the hard wood, on the 100 acres of land situated," etc., evidently having reference to what was *on* the land as the subject of conveyance; and if the construction given to it by the plaintiff is correct, it would convey all the land *upon* the 100 acres of land as well as all the timber, except the hard wood, thereon.

Such is not the ordinary or usual mode of describing land intended to be conveyed, but if the word bark is substituted for land, then the terms of the grant or conveyance are applicable and appropriate.

The terms of payments are, moreover, regulated by the quantity of bark taken off the premises, and the clause providing that "the party of the second part are to have the immediate possession of the land for the purposes above stated, and what time they choose to take the same off." The purposes referred to are peeling the bark and taking the same and the timber sold off from the land; and it was very pro-



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Opinion of the Commission, per LOTT, Ch. C.

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per that a provision fixing the time during which the purchaser thereof should have the right to do it, if the land itself was not sold to him, but appears to be entirely inconsistent with such a sale. In that case his ownership would secure that right; and a limitation of the time during which the seller should have the privilege of taking off the hard wood reserved and excepted by him for the sale, would be proper and necessary.

Without a further reference to the particular terms and provisions of the instruments in detail, I deem it sufficient to say that the whole scope and tenor thereof clearly show that the land itself was not intended to be sold, and the omission to make a provision for the delivery of a deed is also confirmatory of that construction.

Assuming the views above expressed to be correct, it follows that the title of John Brandow to the land was not divested, and that the possession of the plaintiff was subordinate thereto, and was limited and restricted to the single purpose of securing the bark and timber purchased by him.

It is claimed on behalf of the plaintiff, that the judge erred in excluding evidence that the price paid by him was the full value of the land, bark and timber together, except the hard wood. We think not. The contract itself declared and expressed what was sold, and the price to be paid therefor, could not affect that question, and was wholly immaterial.

It only remains to be considered, whether the plaintiff was entitled to judgment for costs.

He failed on the issues affecting the premises, as to which title was pleaded; and the judge has found that neither the possession of nor the title to the residue was made a question or controverted on the trial by the defendant, and the amount of recovery for the trespass thereon by the plaintiff was less than fifty dollars.

A reference to the pleadings and some of the provisions of the Code will be useful in the consideration of that question.

The action before the justice was brought for the recovery of damages for an unlawful entry on two different parcels of

land. The plea of title was interposed to a greater portion of the first and to the whole of the second.

There was a separate cause of action alleged as to each of those parcels, but not as to any specific part of either; and as the plea of title affected both of those causes, the case does not fall within section 62 of the Code, which provides that if, in an action before a justice, the plaintiff have several causes of action, and a plea of title accompanied with the requisite undertaking is interposed to one of them, the justice shall discontinue the proceedings as to that, and may continue them as to the other or others of them. It is therefore necessary to refer to the other sections. Section 55 provides that "in every action brought in a court of justice of the peace, where the title to real property shall come in question, the defendant may, with or without other matter of defence, set forth in his answer any matter showing that such title will come in question," etc. Section 56 requires the delivery of an undertaking to divest the justice of jurisdiction, and section 57 declares that, "upon the delivery of the undertaking to the justice, the action before him shall be discontinued, and each party shall pay his own costs."

It is then, provided, by section 60, that "where a suit before a justice shall be discontinued by the delivery of an answer and undertaking, as provided in sections 55, 56 and 57, the plaintiff may prosecute an action for the same cause in the Supreme Court, and shall complain for the same cause of action only on which he relied before the justice, and the answer of the defendant shall set up the same defence only which he made before the justice." The next section (61) declares that "if the judgment in the Supreme Court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff unless the judge certify that the title to real property came in question on the trial."

The effect of the interposition by the defendant of the plea of title and the delivery of the requisite undertaking under the preceding provisions, was to divest the justice of jurisdic-

tion, and it was optional with the plaintiff to prosecute an action for the same cause or not, at his election. The only consequence resulting from his failure to do so was a liability to pay the defendant the costs he had paid to the justice on the discontinuance.

If such action was brought, then the pleadings and costs therein were to be regulated and controlled by the said sections 60 and 61, and the only just and reasonable construction to be given to section 61 is, that the costs in the Supreme Court are to be governed by the decision and judgment on the issue presented by the plea of title before the justice which caused the prosecution of the action in the Supreme Court. The last clause of that section, which provides that the defendant, although he recovers a verdict, shall nevertheless pay costs to the plaintiff, unless the judge certifies that the title to real property came in question on the trial, evidently has reference to the recovery on the plea of title.

A different rule would charge a defendant with all the costs of the action, including those paid to the justice on the discontinuance of the action, although he fully sustained his defence as to all the acts complained of as trespass on the land to which title was pleaded, and the plaintiff's recovery was limited to those only to which no defence was interposed. In other words, the entire costs of the issues raised and tried in an action would be charged on the prevailing party. A construction leading to such a result cannot be sustained.

It is true that the judge has found that the cattle of the defendant have committed trespasses, causing damage to the plaintiff to the amount of six cents, and it may be conceded that he ought to have borne the necessary costs for the recovery of those damages. That concession, however, affords no ground of right to the costs in the Supreme Court. If he had limited his cause of action before the justice to the trespasses for which he has finally recovered, he would also have recovered the costs allowed by law; but he has, by claiming title to land not owned by him, caused all the costs which

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Opinion of the Commission, per LEONARD, C.

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have accrued in the Supreme Court, and the law declares, and properly, that he should bear them.

It follows that there is no ground for the reversal of the judgment; it must, therefore, be affirmed, with costs.

LEONARD, C. The contract of April 22, 1839, executed by the parties in duplicate, and mutually exchanged, was one instrument, and each counterpart has the same signification, as an expression of the intention of the parties.

The plaintiff executed and delivered to John Brandow a counterpart of the instrument, or one purporting to be such, from which it appears that the plaintiff purchased only "the bark and timber (except the hard wood) on the 100-acre tract," and was granted the right to take immediate possession of the land for the purposes of the contract. According to the tenor of this instrument he has no title to the land, and no trespass against his rights has been committed thereon. It became a part of his case, as the actor seeking redress and invoking the judgment of the court in his favor, to remove every reasonable doubt and obstruction to his right of recovery. The counterpart produced by the defendant was entitled to the same faith and credit as that of the plaintiff. If the plaintiff wished to overcome or remove its force and effect as evidence against his construction, it was his business to present the proper issue to reform or correct it, so that it would truly express the contract on the evidence to be produced under such issue. The want of accuracy in that of the defendant is not proven by the mere production of the counterpart of the plaintiff containing the word "land" in the place of the word "bark," unless the true meaning can be determined by the context or tenor of the instrument to be in harmony with his claim. No doubt the court could, at the trial, properly receive evidence of the situation of the parties, and of the surrounding circumstances, to enable the court to look at the contract in the same light in which the parties entered into it. But there are some instances where no light from the surrounding circumstances, or the situation of the

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Opinion of the Commission, per LEONARD, C.

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parties, can overcome the internal evidence of its meaning to be drawn from the written instrument. The judge or court should receive evidence of this character, when offered, unless it can be clearly determined that neither surrounding circumstances nor situation of parties can affect the question of construction. It was held, in *Judd v. Ensign* (6 Barb., 258), that the copy in the hands of the defendant should be followed, if the difference was material, in an action for a forfeiture of the contract, that being the copy under which the defendant had acted in making a series of annual payments.

The contract of the parties in this case has such inherent evidence of its true meaning, that it carries a clear legal conviction that it relates to a sale of the bark and of the timber, other than the hard wood, and not of the land. The bark was to be peeled and piled; the mode of ascertaining the quantity is mentioned, and is in part dependent on the peeling and piling; the payment is regulated by the measure or quantity of the bark peeled, as well as by the rate per cord when piled. The price of bark is stipulated, and not the price of land. The first payment is on account of "the above bark," and the balance yearly, as the bark and timber were to be taken off. Interest is to be paid from date on the amount of bark peeled, and the plaintiff is not to bear the risk of fire for the first two years. The plaintiff may have what time he chooses to *remove* the bark, but no stipulation is imposed upon Brandow as to the removal of the hard wood. A qualified possession is given to the plaintiff, and none other is mentioned or contemplated. The condition that the consideration or price of the land should be at the risk of the destruction of the bark by fire for two years, as claimed by the construction insisted on by the plaintiff, is without a precedent, and exceedingly improbable. The land is fixed and certain, and, upon a sale, the payment of the price, is universally sought to be secured beyond any chance. If the land was purchased, no concession was necessary as to the time for the removal of the bark, and the omission to restrict Brandow, in respect to taking hard wood, would be equally unnatural and remark-

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Opinion of the Commission, per LEONARD, C.

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able. These numerous provisions to secure the rights of the parties as to the bark and the soft timber are not appropriate in a contract for the sale of land, but are apt and pertinent to a sale of the growing bark. I have purposely omitted to refer to the surrounding circumstances, which would include the very pregnant fact that the agreement was drawn and copied by the plaintiff, the draft, signed by him as an original, having been delivered to Brandow, who was unable to read or write, for the reason that evidence of the value of the land, bark and timber, excepting the hard wood, was offered by the plaintiff and excluded.

The legal meaning and object of the parties was plain, and the mistake of inserting the term "land" in the place of "bark" was apparent, without any resort to surrounding circumstances. Evidence of the value of the land, bark and timber, excepting the hard wood, would prove nothing material without further proof that the price agreed to be paid was more than the bark and soft wood were really worth. There was no offer to prove that these were not really worth the price stipulated; and no certain inference could be drawn that the price of the bark included the land, even if some witnesses had testified that the price agreed to be paid was equal to the value of both land and bark. This evidence was, therefore, immaterial, and its exclusion was no error.

The judge evidently based his opinion that the land was not included in the contract from its context, and in this conclusion he was entirely correct. This holding also renders the extrinsic evidence of the defendant wholly immaterial, although its admission was not erroneous.

I am unable to perceive that the plaintiff has proved a paramount title to the tavern-stand premises. The defendant and those under whom he claims had been in the possession of the premises under a claim of title for more than forty years; at least there was much evidence tending so to prove. Those from whom the plaintiff derives title, bounded the premises conveyed by them by the lands of John Brandow, under

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Opinion of the Commission, per LEONARD, C.

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whom the defendant claims. It can hardly be possible that land conveyed by another, which was bounded upon land belonging to Brandow, could embrace land by which it was bounded, or of which he was in the possession. It appears that the title depended upon the facts proven in the case, upon which the judge has passed in rendering his decision, and it is no longer open to discussion.

The plaintiff objects that the defendant did not plead title by adverse possession, and that his claim, based upon title so derived, ought not to have been considered. In this respect I think he is mistaken. The defendant states in his answer that these premises had been the freehold of John Brandow, and in his possession for more than forty years prior to 1859; that he devised the premises to his daughters, under whose authority the defendant entered and committed the acts complained of. All the elements of an adverse possession are stated, and it was not important to designate the title as an adverse possession. The evidence of possession was properly admitted, and the question was finally passed upon by the court. It is not very apparent that the deed under which the plaintiff claims title purports to convey the premises in question.

The plaintiff also claims that his recovery of six cents damages entitles him to the costs of the action, and that the recovery of costs against him is erroneous.

The sum mentioned was recovered for damages committed by the defendant's cattle in going upon a portion of the lands mentioned in the complaint, as to which the defendant did not plead title in himself.

This action was commenced before a justice of the peace, and discontinued on the plea of title by the defendant. Another action was commenced in the Supreme Court, and it must be presumed that the defendant set up the same defence only, which he made before the justice, as was authorized and directed by section 60 of the Code. There was no question raised that the answer was not the same that had been made before the justice. Hence it is plain that the damages now

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Opinion of the Commission, per LEONARD, C.

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recovered by the plaintiff might have been recovered before the justice. But the plaintiff sought to recover other damages for trespasses upon other lands which he claimed to own, as to which the defendant interposed a plea of title, and has succeeded.

The sixty-first section of the Code directs that, in such an action, the defendant shall pay costs upon a verdict, unless the judge certify that the title to real property came in question on the trial. As to the trespasses concerning which no plea of title was interposed, the action might have been continued under section 62.

The judge, before whom the action was tried, has certified that the defendant did not controvert the plaintiff's title to the land upon which the defendant's cattle committed trespasses, and as to all the residue of the lands, mentioned in the pleadings, the judge has found, and has thereby sufficiently certified, that the defendant had title, and that the title was in issue. The determination of the title was the only subject in controversy. There has been no recovery, by the plaintiff, as to any trespasses where the title to land came in question. Hence the plaintiff is not entitled to costs, under section 304 of the Code, and the defendant is entitled thereto under section 305.

The plaintiff has also insisted that he is entitled to costs under title 6, of chapter 5, of part 3 of the Revised Statutes. It is entirely plain, on a reference to that chapter, that this action was not prosecuted under it, and is not governed by it in any respect. It is not necessary, therefore, to discuss the question whether that chapter is still in force, or has been repealed by the Code. We may concede that it has not been repealed; it would not avail to give costs to the plaintiff, nor to save him from liability therefor.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.



# MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS  
VOLUME AND NOT REPORTED IN FULL.

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WILLIAM G. SANDS, Receiver, etc., Respondent, *v.* EDWARD  
C. GRAVES, impleaded, etc., Appellant.

(Argued May 10, 1871; decided September term, 1871.)

ACTION upon a premium note given to the Ætna Insurance Company of Utica, a mutual insurance company, organized under the general law passed April 10, 1849.

Judgment reversed upon the ground that the assessment was for more than the proportion of the losses and expenses with which defendant's note was properly chargeable.

*Wm. Porter* for the appellant.

*H. R. Mygatt* for the respondent.

EARL, C., reads for reversal.

All concur, except GRAY, C., not voting.

Judgment reversed and new trial granted, costs to abide event.

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PATRICK GREEN, Respondent, *v.* JOHN A. KENNEDY, Appel-  
lant.

(Argued May 10, 1871; decided September term, 1871.)

ACTION for assault and battery and false imprisonment.

Plaintiff was arrested by a police officer of the eighth ward station-house in the city of New York, for passing liquor to

ACTION to recover damages to a cargo of sugar in defendants' custody as common carriers. The bill of lading excepted "dangers of the sea." The boat was towed upon a hidden stump, a recent obstruction in the channel of the Hudson river, and sunk. *Held*, the loss occurred by a danger of the sea, and defendants were not liable.

*Livingston K. Miller* for the appellants.

*Joseph Potter* for the respondents.

GRAY, C., reads for affirmance.

All concur.

Judgment affirmed, with costs.

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HIRAM G. HOTCHKISS, Appellant, *v.* THE COMMERCIAL MUTUAL  
FIRE INSURANCE COMPANY, Respondent.

(Argued May 15, 1871; decided September term, 1871.)

QUESTION as to the construction of the language of a policy.

*M. M. Evarts* for the appellant.

*D. D. Lord* for the respondent.

HUNT, C., reads for reversal; LEONARD and EARL, CC., concur.

LOTT, Ch. C., dissents; GRAY, C., not voting.

Judgment of General Term reversed, and judgment ordered for plaintiff upon the verdict, for \$2,144, with interest and costs, less, \$273.70, and interest thereon from July 14, 1861.

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CHARLOTTE S. WILDER et al., Respondents, *v.* JOHN G. STEARNS,  
impleaded, etc., Appellant.

(Argued May 15, 1871; decided September term, 1871.)

B. G. WILDER, the owner of a patent for improvement in safes, transferred the same to defendants upon their agreement to pay three-fourths of a cent per pound on weights of all safes sold by them during the term of the contract. Also, that in case of renewal they should have the same right upon the same terms. Before the expiration of the original patent, defendant Roff assigned to Stearns. The patent was renewed for seven years. After the renewal the safes were manufactured by Stearns & Marvin. On the 1st November, 1860, Stearns sold out to Marvin, and delivered possession of the stock of safes on hand, amounting to 837,148 pounds. Upon this amount plaintiffs, as assignees of Wilder, claimed the royalty. *Held*, that as Marvin was not, as far as the patentee was concerned, a partner in the manufacture of the safes, the manufacture and sale by the firm of Stearns & Marvin being only protected by the license to Stearns; whenever the safes manufactured passed from the authority and control of Stearns, the license was at an end, and the rights of the patentee terminated. The transfer was, therefore, a sale within the meaning of the contract, and defendant Stearns liable for the royalty.

*Wm. M. Evarts* for the appellant.

*J. M. Van Cott* for the respondents.

HUNT, C., reads for affirmance.

All concur, except EARL, C., dissenting.

Judgment affirmed.

GEORGE S. TERRY, Receiver, etc., Respondent, *v.* WILLIAM WAIT, Impleaded, etc., Appellant.

(Argued May 16, 1871; decided September term, 1871.)

ACTION to recover amount of a promissory note given by defendant, William Wait, to David W. Wait, of whose property plaintiff was appointed receiver in proceedings supplementary to execution. The complaint alleged that the note

was transferred to Martin, the other defendant, with intent to defraud the judgment creditor. Defendant Wait answered, denying complaint and pleading payment. The note was paid to Martin after notice of plaintiff's claim. Martin suffered default. *Held*, that to recover against defendant Wait it was incumbent upon plaintiff to prove the allegations of fraud; that he was not affected by the default of Martin; and there being no evidence of fraud in the case, judgment reversed.

*W. A. Beach* for the appellant.

*E. F. Bullard* for the respondent.

EARL, C., reads for reversal. All concur, except GRAY, C., dissenting.

Judgment reversed and new trial ordered, costs to abide event.

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JAMES B. WILSON, Appellant, *v.* WILLIAM T. BLODGETT et al.,  
Respondents.

*D. McMahon* for the appellant.

*J. H. Reynolds* for the respondents.

Argued and decided with *Kerr v. Blodgett*, *ante*, p. 62.

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JAMES M. DONLEY, Respondent, *v.* WILLIAM GRAHAM,  
Appellant.

No appeal lies to this court from an order denying a motion for a new trial on the ground of surprise or newly discovered evidence. The question is one of discretion with the court below.

(Argued May 17, 1871; decided September term, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the sixth district, affirming a judgment for plaintiff on verdict, and affirming order denying motion for new trial on the evidence and on account of newly discovered evidence.

The only errors alleged were, the verdict was against the weight of evidence, and that the motion for new trial was improperly denied. *Held*, that an appeal cannot be entertained in this court upon either of these grounds.

*G. L. Sessions* for the appellant.

*L. Seymour* for the respondent.

LEONARD, C., reads for affirmance.

All concur.

Judgment affirmed, with costs.

WILLIAM C. BUSH, Respondent, *v.* THE ROCHESTER CITY  
BANK et al., Appellants.

(Argued May 18, 1871; decided September term, 1871.)

ACTION to foreclose mortgage made by James M. Demarest to Horace F. Bush, and assigned to plaintiff. At the same time the mortgage was executed, Bush executed another mortgage to the Rochester City Bank. The bank foreclosed its mortgage, bid in the property and conveyed it by quit-claim deed to defendants Campbell and Clark. The bank, and Campbell and Clark, put in answers, claiming the bank mortgage was to have priority. The court found it had no priority, but that there was an equality of lien, and ordered sale for the payment of both mortgages. The bank only appealed. *Held*, that the bank had no interests affected by the judgment, and had therefore no right to appeal.

*James L. Angle* for the appellants.

*James C. Cochrane* for the respondent.

GRAY, HUNT and EARL, CC., read for affirmance.

All concur.

Judgment affirmed, with costs.

ROSWELL C. SMITH, Respondent, *v.* JOSHUA P. LIPPINCOTT  
et al., Appellants.

(Submitted May 19, 1871; decided September term, 1871.)

DECIDED upon the facts in the case.

*Alexander & Green* for the appellants.

*John Slosson* for the respondent.

HUNT, C., reads for affirmance.

All concur, except LEONARD, C., not sitting.

Judgment affirmed, with costs.

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SEYMOUR T. DAY, Respondent, *v.* RHODA N. MONTEATH,  
Administrator, etc., Appellant.

(Argued September 19, 1871; decided January term, 1872.)

DECIDED upon the facts in the case.

*George B. Hibbard* for the appellant.

*John Ganson* for the respondent.

LOTT, Ch. C., and LEONARD, C., read for affirmance.

All concur.

Judgment affirmed, with costs.

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JACOB P. MARSHALL et al., Respondents, *v.* THE NEW YORK  
CENTRAL RAILROAD COMPANY, Appellant.

(Submitted September 19, 1871; decided January term, 1872.)

*A. P. Laning* for the appellant.

*E. G. Lapham* for the respondents.

HUNT, C., reads for affirmance.

All concur.

Judgment affirmed, with costs.

THOMAS N. GIBBS et al., Respondents, v. JOHN VAN BUREN,  
Jr., Appellant.

(Argued September 20, 1871; decided January term, 1872.)

ACTION to recover the value of a quantity of wheat, which defendant, as common carrier, had contracted to transport for plaintiff from Oswego to Albany, to deliver to consignees, who had an office upon the pier within the city of Albany. Upon the arrival of the boat at Albany, the master reported to the consignees, who directed him to proceed with his boat and cargo across the channel of the Hudson river to a railroad elevator at East Albany, within the port of Albany. The master complied with the directions, and, while waiting to discharge his cargo, a fire, originating in the elevator, nearly destroyed the cargo. The consignors, by direction of the defendant, sold the damaged cargo, and paid over the avails to plaintiffs' agent. Defendant claimed that the master, in crossing the river, was not acting under his employment or authority, and that his liability as common carrier had ceased when the fire occurred. *Held*, that the fact that defendant continued his control of the property after the fire, with other facts, afforded a legitimate inference that the parties, in contracting, had reference to the port and not alone to the city of Albany; also, that there was not sufficient delivery before the fire to discharge the carrier, and that defendant was liable.

*G. N. Kennedy* for the appellant.

*Albertus Perry* for the respondents.

GRAY, C., reads for affirmance.

All concur, except LOTT, Ch. C., dissenting.

Judgment affirmed, with costs.

WILLIAM A. HADDEN et al., Respondents, v. JEREMIAH W.  
DIMICK, Appellant.

(Argued September 21, 1871; decided January term, 1872.)

ACTION to recover damages for breach of contract. Verdict ordered by the court for plaintiffs. Reversed upon the ground that there was some evidence tending to show a parol waiver of the contract by plaintiffs, which should have been submitted to the jury; and, if they found such waiver, plaintiffs would be estopped from claiming a non-performance.

*William G. Choate* for the appellant.

*John Slosson* for the respondents.

EARL, C., reads for reversal.

All concur; LEONARD, C., not sitting.

Judgment reversed and new trial granted, costs to abide event.

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ANTHONY M. STRONG, Respondent, *v.* ADAM BLAKE, 2d, et al., Appellants.

*G. L. Stedman* for the respondent.

Judgment affirmed by default, with costs.

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JOB D. TANNER, Appellant, *v.* MARTIN S. HILLS, Respondent.

One H. worked plaintiff's farm under a contract, in and by which plaintiff agreed to let the farm to H. to work on shares upon certain conditions, among others, that plaintiff was to account and pay to H., in consideration of the premises and for his performance, the value of one-half of all the grain, etc., produced from the farm. *Held*, that the parties were not tenants in common of the crops, but that plaintiff had exclusive title thereto.

(Argued September 21, 1871; decided January term, 1872.)

*John Gaul* for the appellant.

*R. E. Andrews* for the respondent.



LEONARD, C., reads for reversal.

All concur.

Order of General Term reversed, and judgment of County Court affirmed, with costs in both courts. ✓

THE WAYNE AND ONTARIO COLLEGIATE INSTITUTE, Respondent,  
v. HORACE BLACKMAR, Appellant.

(Argued September 21, 1871; decided January term, 1872.)

ACTION upon a subscription paper made payable to the "treasurer of a board of trustees which may be elected by the Wayne County Baptist Association at a convention to meet at Marion, on Wednesday, the 30th of the present month," and upon a bond executed to plaintiff, conditioned to pay \$500 "when a *bona fide* subscription of \$10,000 is made by such persons as are responsible, including the responsible subscriptions heretofore made," etc.

Defendant offered to show, as a defence to the subscription, that the trustees mentioned in complaint are not the trustees elected at the time specified in the bond, but were irregularly elected at another time and place.

*Held*, that this was a good defence under the authority of the case *Same Plaintiff v. Lavinney* (Court of Appeals, December term, 1869), and the evidence was erroneously excluded.

Plaintiff produced and proved an agreement, signed by responsible persons, "agreeing to guaranty the payment of the subscriptions, and agreeing to pay to the trustees a further sum sufficient to make up, when added to the amount of such subscriptions, \$10,500. *Held*, that this was a substantial and sufficient compliance with the conditions of the defendant's bond.

*T. R. Strong* for the appellant.

*L. Tremain* for the respondent.

HUNT, C., reads for deducting from the judgment the sum of \$39.60, the amount of judgment upon the subscription paper, with interest from April 24, 1865, and for affirmance of the judgment as to residue, with costs.

All concur.

Judgment accordingly.

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JAMES C. TAYLOR, Respondent, v. JEREMIAH V. SPADER,  
Appellant.

(Argued September 21, 1871 ; decided January term, 1872.)

ACTION to recover damages for the conversion of 100 barrels of flour deposited with defendant, a warehouseman in the city of New York, by one Walter S. Hicks, who took a warehouse receipt therefor, acknowledging the receipt of the flour, on account of and subject to the order of S. F. Taylor, plaintiff's agent, who assigned and transferred the receipt to plaintiff. Defendant refused to deliver the flour on demand. Subsequently John W. Padden commenced an action of replevin against Hicks and defendant, claiming that Hicks had purchased the flour of him fraudulently. The sheriff took the flour, but redelivered the same to defendant, upon his giving security. That action was pending at the time of the commencement of the present one. The defendant herein set up, in his answer, the claim of Padden and the pendency of the replevin suit. Padden then commenced an action against plaintiff, claiming title to the flour and praying that the warehouse receipt be canceled, and plaintiff be restrained from prosecuting this action. Plaintiff set up his title in his answer ; that action was tried and resulted in favor of plaintiff (the defendant therein). The judgment was sustained upon appeal. (44 N. Y., 371.) Padden indemnified the defendant in this action, and assumed and conducted the defense. *Held*, that the judgment in the case of *Padden v. Taylor*, was conclusive upon the defendant herein. *Also*, *held*, that defendant, not having based his refusal to deliver

up the property upon the ground that the warehouse charges were not paid, and not having placed his defense upon that ground, could not avail himself of that objection upon trial.

*F. N. Bangs* for the appellant.

*L. A. Fuller* for the respondent.

EARL and LEONARD, CC., read for affirmance.

All concur.

Judgment affirmed, with costs.

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JOSEPH STACKPOLE, Appellant, *v.* HENRY ROBBINS et al.,  
Commissioners, etc., Respondents.

(Argued September 21, 1871; decided January term, 1872.)

THIS action was brought to restrain defendants, as loan commissioners, from foreclosing a mortgage executed to their predecessors upon lands owned by plaintiff. A prior attempt had been made to foreclose the same mortgage by defendants' predecessors. The premises were sold and deeded by the loan commissioners, and a new mortgage taken back. Plaintiff brought suit against all the parties, asking to have the sale and all the subsequent transfers and the second mortgage set aside and canceled, on the ground of irregularities, and that the sale was collusive and fraudulent as against him. He succeeded in that suit, and judgment was rendered therein as asked for. Defendants thereupon recommenced foreclosure of the first mortgage, which this action is brought to restrain; plaintiff claiming that the prior foreclosure exhausted the power of sale and rendered the mortgage void, and that the vacation of the sale did not revive the extinguished lien. *Held*, that the judgment in the former suit left the parties in the precise position occupied by them before the first foreclosure was attempted; that it did not affect the validity of the original mortgage, and that defendants had the right to foreclose the same.

*John H. Reynolds* for the appellant.

*M. I. Townsend* for the respondents.

GRAY, C., reads for affirmance.

All concur.

Judgment affirmed, with costs.

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MARGARET H. SCHOTT, Respondent, *v.* LEOPOLD SCHWARTZ,  
Appellant.

(Submitted September 21, 1871; decided January term, 1872.)

PLAINTIFF, a married woman, while the act of 1860, (Laws of 1860, chap. 90) concerning the rights and liabilities of husband and wife, was in force, without the written consent of her husband, under an agreement with defendant, deeded certain real estate to grantees named by defendant. The deed was subject to a mortgage, plaintiff giving her bond conditioned to pay any sum due thereon over \$1,100. The grantees went into possession under her deed, and continued in possession until ousted by foreclosure and sale under the mortgage, upon which there was due \$1,378 at the time specified in plaintiff's bond. Neither the grantees nor defendant offered to reconvey or to rescind the contract. Subsequent to the execution of this deed, and while the grantees therein named were in possession under it, plaintiff and her husband joined in a deed of the premises to a third person. In an action upon a bond given as a part of the consideration of the first deed,—*Held*, that although such deed was invalid, there was not a total failure of consideration; that defendant's remedy for the defect of title was for damages only, and that the question was unaffected by the execution of the second deed, as the possession of the grantees in the first deed under claim of title was an adverse holding, and therefore under the statute (1 R. S., 739, § 147) the second was absolutely void; also, that no complaint could be made of an eviction arising from the foreclosure of the mort-

gage. It was the duty of the grantees to pay it and to look to plaintiff for the excess over \$1,100 upon her bond. This had nothing to do with the question of failure of title.

*Wm. C. Ruger* for the appellant.

*S. R. Ten Eyck* for the respondent.

LEONARD and HUNT, CC., read for affirmance.

All concur. Judgment affirmed, with costs.

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JAMES BRACKETT et al., Appellants, v. GEORGE G. WYMAN  
et al., Respondents.

(Argued September 22, 1871; decided January term, 1872.)

PLAINTIFFS and defendants each had judgments against one John R. Wyman. Certain real estate of said Wyman was being sold at a foreclosure sale upon a mortgage, which was a prior lien to the judgment. Plaintiffs assigned to defendants their judgment, and agreed not to bid at the foreclosure sale, upon defendants executing to them an agreement to pay \$600 in installments. Plaintiffs did not bid and the premises were purchased by defendants. Plaintiffs brought suit upon the agreement. *Held*, that plaintiffs' agreement to abstain from bidding was unlawful as against public policy, and rendered the whole contract void.

*O. M. Benedict* for the appellants.

*Charles G. Judd* for the respondents.

GRAY, C., reads for affirmance.

All concur.

Judgment affirmed, with costs.

CHARLES W. EASTWOOD et al., Respondents, v. JAMES  
McNULTY et al., Appellants.

(Argued September 23, 1871; decided January term, 1872.)

ACTION for accounting between partners. The only questions presented were as to the construction of the articles of co-partnership.

*David McAdam* for the appellants.

*S. T. Freeman* for the respondents.

HUNT and LEONARD, CC., read for affirmance.

All concur.

Judgment affirmed, with costs.

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ROBERT MAGAW, Respondent, v. WILLIAM D. FIELD et al.,  
Appellants.

(Argued September 23, 1871; decided January term, 1872.)

ACTION of ejectment. The question presented was as to the construction of the following clause of the will of John S. Gerritsen:

"I give, devise and bequeath to the children of Van Brund Magaw, late of Gravesend, deceased, all that certain piece or parcel of land \* \* \* to have and to hold the same to the said children, their heirs and assigns forever." The will was executed in 1833; the testator died in 1864. At the time of the execution of the will there were seven children of Van Brund Magaw living. All had died but two before the testator's death. The two living claimed the whole estate, and brought this action against the children of the deceased children. *Held*, that the devise was to a class, and only the two surviving children took under it.

*H. B. Hubbard* for the appellants.

*P. S. Crooke* for the respondent.

LEONARD and EARL, CC., read for affirmance.

All concur, LOTT, Ch. C., not sitting.

Judgment affirmed, with costs.

CHARLES G. KELLOGG, Respondent, *v.* DANIEL PIKE et al.,  
Appellants.

(Argued September 25, 1871; decided January term, 1872.)

DECIDED upon the facts and the admissions in the answer.

*A. Boardman* for the appellants.

*A. H. Dana* for the respondent.

HUNT and LEONARD, CC., read for affirmance.

All concur.

Judgment affirmed, with costs.

CYRENIUS M. GREEN. Respondent, *v.* WILLIAM H. PLANK,  
Appellant.

(Argued September 25, 1871; decided January term, 1872.)

ACTION to recover possession of a canal boat, with damages for the taking and detention. After proof of title, of the taking, and that plaintiff had lost its use from the time of taking up to the time of trial, plaintiff, as a witness, was permitted to answer, under objection, the following question: "State the damages for the taking and withholding the boat during that time?" *Held*, error, upon authority of case *Matthews v. Matthews* (2 N. Y., 514.)

*Barlow & Kennedy* for the appellant.

*D. K. M. Johnson* for the respondent.

LOTT, Ch. C., reads for reversal.

HUNT and LEONARD, CC., concur.

EARL, C., reads for affirmance.

GRAY, C., concurs.

(The Commissioners dissenting agree with the majority upon the question of law, but hold that the evidence received could, by no possibility, have injured defendant.)

Judgment reversed and new trial ordered, costs to abide event.

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CYRUS GRISWOLD, Respondent, *v.* ELBERT W. COOK, Appellant.

(Argued September 26, 1871 ; decided January term, 1872.)

DECIDED upon the facts in the case.

*John C. Strong* for the appellant.

*A. P. Nichols* for the respondent.

HUNT, C., reads for affirmance.

All concur.

Judgment affirmed, with costs.

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THE CENTRAL BANK OF TROY, Respondent, *v.* WILLIAM HEYDORN, Appellant.

ARGUED and decided with *Central Bank of Troy v. Heydorn*, ante p. 260.



OSCAR TYLER, Respondent, v. WILLIAM HEYDORN, Appellant.

Argued and decided with *Central Bank of Troy v. Heydorn*, ante, p. 260.

JOHN H. JEFFRES, Respondent, v. JAMES C. COCHRANE, Appellant.

(Argued September 26, 1871; decided January term, 1872.)

PLAINTIFF was appointed receiver of the property of one John Hughes in proceedings supplementary to execution. As such receiver, he brought an action against Hughes and wife to reach three notes which he alleged had been transferred by Hughes to his wife in fraud of his creditors. During the pendency of the action, the wife transferred one of the notes to her attorney in the action, receiving part of the purchase price in cash, the balance being applied in payment for his services. The other two notes were transferred before maturity to *bona fide* purchasers. Plaintiff recovered judgment ordering Hughes and wife to deliver to him the notes, or so much thereof as should be necessary to satisfy the original judgment and costs. Upon proceeding by attachment against the wife, it appeared that she had expended the proceeds of the notes, and had no means to pay the judgment. Plaintiff thereupon brought his action against the attorney to recover the avails of the note transferred to him. *Held*, that defendant having purchased *pendente lite*, with notice, was bound by the judgment, and that plaintiff was entitled to recover.

*J. C. Cochrane* for the appellant.

*E. Harris* for the respondent.

GRAY, C., reads for affirmance.

All concur.

Judgment affirmed, with costs.

A. I. FITCH, Respondent, *v.* JOHN W. RUSSELL, Appellant.

(Argued September 27, 1871 ; decided January term, 1872.)

PLAINTIFF sought to recover a sum alleged to have been expended on joint account of himself and defendant in a partnership transaction. Answer, a denial and counter-claim. The case was tried without objection to the form of action or shape of pleadings. *Held*, these questions could not be raised upon appeal.

*F. J. Fithian* for the appellant.

*E. P. Clark* for the respondent.

GRAY, C., read for affirmance.

All concur, LEONARD, C., not sitting.

Judgment affirmed with costs.

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WILLARD DIVOLL, Respondent, *v.* HENRY HENKEN, Appellant.

(Argued September 28, 1871 ; decided January term, 1872.)

THE complaint in this action alleged an agreement on the part of defendant to pay plaintiff a commission of two and a half per cent upon a purchase price, for procuring a purchaser for defendant's farm, which plaintiff did. Upon the trial, the evidence, received without objection, showed an agreement to pay the commission upon the price of the property sold. This included a large amount of personal property as well as the farm. There was no suggestion upon the trial of variance between the evidence and the complaint. Plaintiff recovered the per centage upon the whole sale. *Held*, the objection could not be raised upon appeal, and if raised upon the trial it would have been the duty of the referee to have amended the complaint.

*Samuel Hand* for the appellant.

*Ira H. Tuthill* for the Respondent.

LEONARD and EARL, CC., read for affirmance.

All concur, LOTT, Ch. C., not sitting.

Judgment affirmed, with costs.

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GEORGE L. BALDWIN, Respondent, v. JOHN DORSAY BALD et al., Appellants.

(Argued September 27, 1871; decided January term, 1872.)

UPON the dissolution of a co-partnership between plaintiff and defendants, the parties entered into a written agreement, by which the former assigned all his interest in the firm property to the latter, and all claims against the firm or defendants individually, in consideration of receiving certain designated stocks, notes and securities, etc., and of the agreement upon the part of defendants to assume and pay the partnership debts by another agreement executed at the same time as alleged by plaintiff, as an inducement for him to execute the first. Defendants agreed to allow plaintiff any correct charges which had not been credited to him on the books of the firm and to give him credit therefor. In an action to recover the amount of such charges not credited, it appearing that at the time of the dissolution plaintiff's account showed a large indebtedness on his part to the firm. *Held*, that the presumption was that stocks, notes, etc., received by plaintiff were given him upon the basis that the amounts thereof were found due him upon settlement of all their business, including his individual account as it then appeared upon the books, and the agreement to allow charges not credited thereon was not simply to credit them in a settled account, but to pay them.

Upon the trial, plaintiff was allowed to prove what was said

SICKELS—VOL. III. 85

and done prior to the execution of the agreement to allow the balance of his account. *Held*, no error, as it was evident from the pleadings that the object of the question was not to vary anything contained therein, but to show the circumstances which induced the execution of it.

*B. F. Dunning* for the appellants.

*Francois Byrne* for the respondent.

LORT, Ch. C., reads for affirmance.

All concur, except EARL, C., dissenting.

Judgment affirmed with costs.

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JAMES M. SMITH et al., Respondents, v. WILSON G. FOX,  
impleaded, etc., Appellant.

(Argued September 28, 1871; decided January term, 1872.)

ACTION upon a promissory note, dated March 3d, 1866, payable sixty days from date, executed by defendants and discounted by one Edward S. Rich, an individual banker. Plaintiffs claimed title by virtue of an assignment for the benefit of creditors, executed by Rich, April 12, 1866. At the time Fox had a balance to his credit on deposit account with Rich to more than the amount of the note. Defendants asked to have sufficient of the account to balance the note set off against it. This the court refused. *Held*, error, on authority of the case of *Smith v. Felton* 43 N. Y., 419).

*Samuel Hand* for the appellants.

*John Ganson* for the respondents.

GRAY, C., reads for reversal.

All concur.

Judgment reversed and new trial ordered, costs to abide event.

JOHN LEVY et al., Respondents, v. THE GREAT WESTERN  
RAILROAD COMPANY, Appellant.

(Argued September 28, 1871; decided January term, 1872.)

ACTION to recover damages for injuries sustained by Louisa Levy, in crossing defendant's tracks. *Held*, that she was chargeable with contributory negligence, according to the rule laid down in *Gorton v. The Erie Railway Company* (43 N. Y., 660).

*John H. Reynolds* for the appellant.

*Amasa J. Parker* for the respondents.

LEONARD and EARL, CC., read for reversal.

All concur.

Judgment reversed and new trial granted, costs to abide event.

JOSEPH BRAND, Respondent, v. ALLEN BRAND et al.,  
Appellants.

(Argued September 28, 1871; decided January term, 1872.)

DEFENDANTS were jointly indebted to the plaintiff in the sum of \$100; plaintiff was indebted to Edward Brand, one of the defendants, in an equal or greater amount. It was agreed, by parol, between plaintiff and Edward, that the debt due the former should be set off and applied upon the demand of the latter, and that the former's claim be thereby canceled. Plaintiff brought this action to recover his demand. *Held*, that the agreement was not one of sale or transfer, and was not within the provisions of the statute of frauds. (GRAY and LEONARD, CC., dissenting.)

*D. K. Olney* for the appellants.

*Lyman Tremain* for the respondent.

HUNT, C., reads for reversal.

GRAY, C., for affirmance.

For reversal, LOTT, Ch. C., HUNT and EARL, CC.

For affirmance, GRAY and LEONARD, CC.

Order of General Term reversed, and judgment, upon report of referee, affirmed, with costs.

OSCAR H. CLOUGH, Respondent, *v.* PATRICK MURRAY,  
Appellant.

*Samuel Hand* for the respondent.

Affirmed by default, with costs.

ISAAC W. EDWARDS, Respondent, *v.* ABRAHAM B. CONGER,  
Appellant.

*C. P. Hoffman* for the respondent.

Affirmed by default, with costs.

LOTT, Ch. C., not sitting.

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48c	676
130	230
130	412

THOMAS NEWTON, Respondent, *v.* JULIAN HOOK, Appellant.

A judgment by default in an action to recover a payment of interest due upon a promissory note, where process was personally served and defendant appeared, but did not answer, is conclusive evidence against a defence of usury interposed in an action between the same parties, brought to recover the principal of said note. (LOTT, Ch. C., dissenting.)

(Submitted September 30, 1871; decided January term, 1872.)

THIS action was brought against defendant, as indorser, to recover the amount of these promissory notes, payable in one, two and three years respectively, with interest semi-annually. Defense, usury. Plaintiff proved a judgment,

recovered in the District Court for the third judicial district in the city of New York, in his favor, against defendant and the maker of the note, in an action brought to recover a payment of interest due upon two of the notes; the complaint was personally served; defendant appeared by counsel, but no answer was interposed, and judgment was taken by default. All the notes grew out of the same transaction; defendant here offered evidence to prove his defense of usury; objected to by plaintiff upon the ground that defendant was estopped by the judgment in the District Court; evidence rejected. *Held*, no error, and that the judgment in the District Court was conclusive.

*Randolph, Alexander & Green* for the appellant.

*Samuel Hand* for the respondent.

HUNT, C., reads for affirmance.

LOTT, Ch. C., reads for reversal.

For affirmance, HUNT, GRAY and EARL, CC.

For reversal, LOTT, Ch. C.; LEONARD, C., not sitting.

Judgment affirmed, with costs.

ELKANAH B. WHIPPLE et al., Respondents, v. RICHARD WHIPPLE et al., Appellants.

*A. P. Caswell* for the respondents.

Affirmed by default.

LOTT, Ch. C., not sitting.

WHITMAN PHILLIPS, Respondent, v. JOSIAH G. CLARK, Appellant.

Plaintiff and one S. were partners. Upon dissolution they entered into a written agreement, by which S. assigned and transferred all his rights and interest in the assets of the firm to plaintiff, who was to collect all the accounts, etc., and pay the firm debts, and with the share of S. in the

residue, and the avails of certain individual property also transferred, to pay certain paper made in the firm name by S. for his individual benefit: the balance, if any remained, to be paid to S. In an action brought by plaintiff to recover a debt due the firm,—*Held*, that S. was not a necessary party plaintiff.

(Submitted September 30, 1871; decided January term, 1872.)

*J. F. Malcolm* for the appellant.

*Whitbeck & Wandall* for the respondent.

EARL, C., reads for affirmance.

All concur.

Judgment affirmed, with costs.

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HARVEY CHURCH, Appellant, v. JONATHAN W. FREEMAN,  
impleaded, etc., Respondent.

(Argued September 30, 1871; decided January term, 1872.)

ACTION for an accounting between partners. Defence, settlement. Decided upon the facts in the case.

*R. W. Van Pelt* for the appellant.

*J. H. Reynolds* for the respondent.

EARL, C., reads for affirmance.

All concur.

Judgment affirmed with costs.

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SETH WAKEMAN et al., Respondents, v. GEORGE BRISBANE,  
Appellant.

(Argued October 3, 1871; decided January term, 1872.)

Decided upon the facts in the case.



*A. N. Weller* for the appellant.

*Seth Wakeman* for the respondents.

GRAY, C., reads for affirmance.

All concur.

Judgment affirmed, with costs.

DAVID H. COLE, Respondent, *v.* THE NEW YORK CENTRAL  
RAILROAD COMPANY, Appellant.

(Argued October 4, 1871; decided January term, 1872.)

ACTION to recover damages sustained by plaintiff while a passenger upon defendant's road. The cars ran off the track in consequence of a broken rail. Decided upon the ground that there was no evidence in the case showing any negligence or fault upon the part of the defendant.

*A. P. Laning* for the appellant.

*W. F. Cogswell* for the respondent.

LOTT, Ch. C., and HUNT, C., read for affirmance.

EARL, C., reads for reversal.

For reversal, EARL, LEONARD and GRAY, CC.

For affirmance, LOTT, Ch. C., and HUNT, C.

Judgment reversed and new trial granted, costs to abide event.

STEPHEN KBOM et al., Appellants, *v.* JOHN J. LEVY,  
Respondent.

(Argued October 4, 1871; decided January term, 1872.)

ACTION upon an account. Defendant set up a counterclaim for breach, on the part of plaintiffs, of a contract to plane and prepare a plate to print the backs of cards. Defendant was allowed to prove as damages the loss sustained by being deprived of the plate for several months in his business, and

the referee allowed him such damages. *Held*, error within the rule laid down in *Blanchard v. Ely* (21 Wend., 342) and *Griffin v. Colver* (16 N. Y., 489).

*A. C. Morris* for the appellants.

*N. B. Howie* for the respondent.

LOTT, Ch. C., and EARL, C., read for reversal.

All concur.

Judgment reversed and new trial ordered, costs to abide event.

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EDWARD ELSWORTH, Respondent, *v.* GEORGE CALDWELL et al.,  
Appellants.

A petitioning creditor under the two-thirds act, who adds to his signature the declaration of release required by said act (2 R. S., 36, § 11), thereby only transfers to the assignee any and every lien or security upon the estate and property of the debtor, not a lien or security upon the property of a third person. When, therefore, such creditor has a joint judgment against two, the signing of the petition of one does not transfer to the assignee his claim against or lien upon the property of the other.

(Argued January 2, 1872; decided May term, 1872.)

THIS was a motion for leave to issue an execution upon the judgment in this action. It was opposed upon the ground that plaintiff had signed a petition for the discharge of the defendant, W. Caldwell, under the two-thirds act, adding to his signature the declaration of release required by said act (2 R. S., 36, § 11); that assignees were duly appointed and said defendant discharged, and that the judgment herein was rendered by virtue of the assignment sold and assigned by the assignees.

The motion was denied at Special Term. Upon appeal, the General Term so modified the order as to give plaintiff leave to issue execution against the property of George Caldwell.

*Ira D. Warren* for the appellants.

*Wm. A. Coursen* for the respondent.

LOTT, Ch. C., reads for reversal; HUNT and GRAY, CC., read for affirmance.

For affirmance: HUNT, GRAY and EARL. For reversal: LOTT, Ch. C.; LEONARD, C., not voting.

Order affirmed, with costs.

ELIZABETH WAUGH, Administratrix, Appellant, v. JOHN FIELDING et al., Respondents.

48 a 681  
159 380

(Argued January 2, 1872; decided May term, 1872.)

THIS was an action to recover a balance alleged to be due upon the sale of an engine and boiler; defence, fraud in the sale. Upon the trial, after defendants had given evidence as to plaintiff's representations and the defects in the property purchased, plaintiff offered himself as a witness, and was asked by his counsel, and allowed to answer, the question: "Did you give, or intend to give, the defendants anything more than your opinion in regard to its condition?" *Held*, error. The cases of *Seymour v. Wilson* (14 N. Y., 567) and *Cortland v. Herkimer* (44 N. Y., 22) distinguished.

*E. H. Berm* for the appellant.

*A. Robertson* for the respondents.

HUNT, C., reads for affirmance.

All concur.

Order affirmed, and judgment absolute against plaintiff, with costs.

JOSEPH PIKE, Respondent, v. JOSEPH WALTER, Appellant.

(Argued January 4, 1872; decided May term, 1872.)

ACTION for the conversion of certain farm stock. Defendant leased to plaintiff his farm. The lease contained a provision that defendant was to have certain stock, consisting of cows, sheep, etc.; he was to pay as rent one-half of the pro-

ducts of the farm and stock. When any of said property was sold or fit for market, the avails were to be equally divided. Said plaintiff was to leave as much worth of stock on the premises as he took. The property in question was part of the stock delivered to plaintiff which were unsold and remained on the premises at the end of the term. Defendant took possession and refused to deliver. The value of the stock in question was appraised at the end of the year by agreement, and showed an increase in value over the first appraisal of \$303, for which plaintiff obtained judgment.

*George Sidney Camp* for the appellant.

*C. E. Martin* for the respondent.

LOTT, Ch. C., reads for affirmance, upon the ground, that by the lease, the title to the property was vested in plaintiff. LEONARD, C., concurred.

EARL, C., for affirmance. The parties were joint tenants, plaintiff's interest being the increased value; and defendant, having leased the property to another, was liable for conversion.

HUNT, C., for reversal. Plaintiff was lessee merely, and bound to return the specific articles.

GRAY, C., for reversal, unless plaintiff stipulates to reduce judgment one-half, on the ground that plaintiff was only entitled to one-half the increase.

Judgment affirmed, with costs.

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GIDEON W. TYLER, Respondent, v. EDWARD GOULD, Appellant.

The drawing of a draft or check upon a banker holding funds of the drawer does not operate as an assignment of such funds.

(Argued January 4, 1872; decided May term, 1872.)

THIS action was brought by plaintiff, as assignee of Canfield & Ladd, to recover a balance on deposit with the Citizens' Bank, which was originally defendant. The present defendant

was substituted under section 122 of the Code. Canfield & Ladd had on deposit with Atwood & Co., of New York, \$2,700, and a quantity of paper for collection. Atwood & Co. failed, and, with assent of Canfield & Ladd, delivered the paper to the Citizens' Bank. Canfield & Ladd had drawn sight drafts on Atwood & Co.; they failed, and made an assignment. Six days after the assignment, the holders of the drafts commenced suit, by attachment against them, which was served upon the bank, and under it defendant claimed the avails of the collections on deposit with the bank. A verdict was taken for the plaintiff, subject to the opinion of the court at General Term.

The General Term directed judgment upon the verdict.

*William A. Courseen* for the appellant.

*William Tracy* for the respondent.

HUNT, C., reads for affirmance.

All concur.

Judgment affirmed.

HAMLIN BABCOCK, Respondent, *v.* WILLIAM L. HERMANOE,  
Appellant.

(Argued January 5, 1873; decided May term, 1873.)

ACTION for dissolution of a co-partnership and an accounting (decided principally upon the facts.)

The complaint alleged that the defendant abandoned the co-partnership business, and that thereby the co-partnership was dissolved as to the further prosecution of the business. Defendant claimed that complaint showed a dissolution before the commencement of the action, and that a decree dissolving it was error. *Held*, that, conceding defendant's construction of complaint, this action was an appropriate remedy for a final adjustment of the partnership concerns; that the clause in the decree dissolving, could by no possibility harm defendant, and was no ground for reversal.

*Sidney & Harris* for the appellant.

*Addison Brown* for the respondent.

GRAY, C., reads for affirmance.

All concur.

Judgment affirmed, with costs.

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JOHN CRAMER, 2d, Receiver, etc., Appellant, v. WILLIAM H.  
BLOOD, Respondent.

To entitle a judgment creditor to attack a disposition made of the debtor's property, he must be able to show that the disposition was such that something remains of it or its proceeds, which ought to be applied upon his judgment. Where, therefore, one received from the debtor's wife the avails of his property in her hands with intent to defraud a creditor, with an agreement to retain or use it as the debtor and wife might want, but, before the recovery of judgment for the debt by the creditor, he has returned it or paid it out as directed by the debtor, and has settled with and been discharged from all claim by the latter, he is not liable to the judgment creditor therefor.

(Argued January 5, 1872; decided May term, 1872.)

THIS action was brought by plaintiff as receiver of the property, etc., of one William A. Lowd, appointed in proceedings supplementary to execution in an action brought by John W. Smith against Lowd. Lowd's wife had in her hands the avails of his property, which had been disposed of by defendant with intent to defraud Smith. Defendant, with the same fraudulent intent, induced Mrs. Lowd (without the knowledge of Lowd) to place in his hands \$200 of the avails, for the use of Lowd and wife, as they might want. Defendant paid out most of the money at Lowd's request, and upon a note signed by him as surety, applying a small portion upon an account, and before the recovery of Smith's judgment, settled with Lowd and wife, and was discharged from all claims.

Plaintiff obtained judgment, which, upon appeal to the General Term, was reversed.

*E. F. Bullard* for the appellant.

*A. Pond* for the respondent.

GRAY and LEONARD, CC., read for affirmance.

All concur.

Order affirmed and judgment absolute against plaintiff, with costs.

WILLIAM ODDY, Respondent, *v.* JOHN B. JAMES, Appellant.

Where a verbal agreement is entered into for the work and labor of one of the parties for a year, to commence *in futuro*, an entry upon the employment, with the acquiescence of the employer, but without a new contract, does not take the case out of the statute of frauds, and the employer is not liable under the contract.

(Argued January 6, 1872; decided May term, 1872.)

ACTION to recover a balance claimed to be due under a verbal contract for work and labor.

About the middle of March, 1864, the parties entered into a verbal agreement by which defendant employed plaintiff to superintend his cement works for one year from the first of April then next, for \$900. On the 1st of April plaintiff entered upon the employment, took charge of the works and continued his superintendency thereof until August 3d, when he was discharged by defendant. His services for the remainder of the year were offered and refused, defendant claiming the agreement was void under the statute of frauds, and that plaintiff could only recover compensation for the time of actual service.

The court ruled adversely to the claim, and submitted the question, whether there was a new contract, to the jury, who found a verdict for plaintiff, which was affirmed at General Term. *Held*, that plaintiff could not recover under the new contract; there was no evidence to justify the finding of a new contract, and the submission to the jury was, therefore, error.

*S. L. Stebbins* for the appellant.

*E. Cooke* for the respondent.

Lott, Ch. C., reads for reversal.

All concur.

Judgment reversed and new trial ordered, costs to abide event.

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JOHN THRALL et al., Appellants, *v.* SIMON KEUM, Respondent.

*John A. Mapes* for the respondent.

Judgment affirmed by default, with costs.

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BENJAMIN T. HOAGLAND, Respondent, *v.* BENJAMIN I. H. TRASK, Appellant.

An assignee for the benefit of creditors can maintain an action, in his individual character, to recover a claim due the assignor; he is not required to sue as trustee.

(Submitted January 6, 1872; decided May term, 1872.)

ACTION to recover the sum of \$2,500, alleged to have been loaned defendant by the firm of Hoagland & Van Pelt. Plaintiff claimed title under a general assignment for the benefit of creditors. Upon the trial, when the assignment was offered in evidence, defendant objected, upon the ground that plaintiff sued in his individual capacity, not as a trustee. Objection overruled, and, at the close of the evidence, defendant asked the court to charge the jury that plaintiff could not recover, because he held the claim as trustee. Various exceptions were also taken as to rejection of testimony. Exceptions ordered to be heard, at first instance, at General Term; there, motion for new trial was denied and judgment ordered on verdict.



*Beebe, Dean & Donohue* for the appellant.

*James L. Stearns* for respondent.

LOTT, Ch. C., reads for affirmance.

All concur.

Judgment affirmed.

THOMAS D. TAYLOR et al., Respondents, v. RUSSELL C. ROOT et al., Appellants.

An order of General Term in an equity action, sending the case back to the referee before whom it was tried to decide upon the question of costs, cannot be reviewed in this court.

Costs in an equity action are in the discretion of the court, and the exercise of this discretion cannot be reviewed.

(Argued January 8, 1872; decided May term, 1872.)

THIS was an action for an accounting. It was four times tried. Upon the final trial the referee reported in favor of defendants for \$945.30, besides costs. From the judgment entered thereon plaintiffs appealed. An order was made by the General Term sending it back to the referee to hear and determine, upon the question of costs, upon the matter and evidence contained in the printed case; appellants to pay the present General Term costs and costs of the last trial before the referee. The parties appeared before the referee in pursuance of the order; he reported that neither of the parties should recover costs against the other. Upon the hearing of the appeal, the judgment was modified to conform to the referee's report. Defendants thereupon appealed to this court. *Held*, that the order sending the case back was not reviewable; it was a mere matter of practice, over which the General Term had jurisdiction; it deprived the defendants of no substantial right, as it gave a hearing *de novo*. The case was to be treated here as if the referee had decided in the first instance that neither party should recover costs. This was a matter of discretion, and not appealable.

*John H. Reynolds* for the appellants.

*J. B. Staples* for the respondents.

EARL, C., reads for affirmance.

LEONARD, C., not sitting.

All concur.

Judgment affirmed, without costs to either party upon appeal.

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GEORGE H. DOUGLASS et al., Respondents, *v.* GILMAN DUDLEY,  
Appellant.

(Argued January 8, 1872; decided May term, 1872.)

ACTION upon a promissory note. The note was placed by defendant in the hands of a broker to be discounted for and on account of defendant. The broker had also in his hands fifty shares of Pacific Mail Steamship Company stock belonging to plaintiffs. Without the knowledge or assent of the parties, the broker pledged the note and stock for a loan for his individual benefit. He subsequently failed. Plaintiffs, without knowledge that defendant's note had been diverted, or that it was other than business paper given for value, paid the amount of the loan and received the stock and note. The referee, before whom the cause was tried, decided that plaintiffs were entitled to contribution in the proportion the amount of the note bore to the value of the stock, and gave judgment accordingly.

*Wm. F. Shepard* for the appellant.

*John S. Jenness* for the respondents.

GRAY, C., reads for affirmance.

All concur.

Judgment affirmed.

JAY PETTIBONE, Appellant, *v.* ABEL S. BLACKMAR,  
Respondent.

(Argued January 10, 1872; decided May term, 1872.)

C., being the owner of thirty shares of the stock of the Third National Bank of Buffalo, sold the same to plaintiff. The by-laws of the bank contained a provision that no transfer of its stock should be made, without the consent of the board of directors, by a stockholder who was liable to the bank in any manner, and that such liability should be a lien upon the stock. A notice of this provision was contained in the certificate assigned to plaintiff. Plaintiff applied to the bank to have the stock transferred to him upon its books. At that time the bank held a note of C., upon which defendant, who was president of the bank, was accommodation indorser. The bank refused to make the transfer unless the note was paid, and refused to deliver it as a subsisting claim against the indorser. Plaintiff paid the amount of the note and accepted the same from the bank, with the indorsement erased, and a receipt of payment in full written thereon, and the stock was thereupon transferred. *Held*, that the acceptance was an acquiescence by plaintiff in the claim of the bank, that the note should be paid and defendant's liability as indorser discharged, and that an action could not be maintained against him thereon.

*William H. Greene* for appellant.

*John Ganson* for respondent.

LOTT, Ch. C., reads for affirmance.

LEONARD, C., reads for reversal.

All concur for affirmance, except LEONARD, C., dissenting.

Order affirmed, and judgment absolute against plaintiff, with costs.



# INDEX.

## ACCEPTANCE.

*See* PAYMENT.

## ACTION.

An assignee for the benefit of creditors can maintain an action, in his individual character, to recover a claim due the assignor; he is not required to sue as trustee. *Hoagland v. Trask*. 686

*See* BAILMENT, 1, 2.

CAUSE OF ACTION.

CLOUD ON TITLE, 1, 2, 3, 4.

FORMER ADJUDICATION, 1.

PARTIES, 5.

PARTNERSHIP, 4.

## ACTS OF CONGRESS.

1. The act of congress providing for the better security of the lives of passengers on board of vessels propelled by steam, etc. (act of July 7, 1838, amended by act of August 30, 1852), does not take away or impair the common-law right of action by a person injured while a passenger upon such a vessel. *Swarthout v. N. J. Steamboat Co.* 209

2. An inspection of the boilers by the proper United States inspector, as prescribed by said act, and a certificate of inspection that in his opinion the vessel, her boiler and machinery, came up to the requirements of the act, is not conclusive, and does not exonerate the owner from liability. *Id.*

3. Under the act of congress of 1863 (13 U. S. Stat. at Large, 781), "for enrolling and calling out the national forces," etc., it was the duty of the provost marshal, when men were presented for enlistment, if he found them of suitable age and "not physically or morally unfit for service," to enlist and muster them in. He had no right to reject them because he thought they would desert, nor to require security against desertion; therefore, aside from the provisions of the statute of frauds, the pledge of such bonds was illegally exacted, and was void, as taken *colore officii*. *Richardson v. Crandall*. 848

## ADMISSIONS AND DECLARATIONS.

*See* EVIDENCE, 8.  
SHIPPING, 7.

## ADVERSE POSSESSION.

*See* EVIDENCE, 8.

## AGREEMENTS.

*See* CONTRACTS.

## AMENDMENT.

*See* *Divoll v. Henken* (Mem.), 672.

## ANSWER.

*See* PLEADING, 1, 2.

## APPEAL.

1. The caption to the findings of the justice, before whom an action to determine the title to real property was tried, was as follows: "At a Special Term of the Supreme Court for motions and chambers business, held at chambers, at the City Hall, in the city of New York." It was objected, that the cause was not tried at any term of court, but before a judge out of court. This objection was not taken below.

*Held*, 1st. That such an objection would not be permitted to be raised in this court for the first time. 2d. That it sufficiently appeared that the cause was tried at a Special Term, held at the place for holding courts in the city of New York, and it would not be assumed that it was not a regular court for the hearing of all Special Term business, in the face of the fact that the parties, without objection, went to trial. *Fisher v. Hepburn*. 41

2. An order setting aside a judgment is appealable to this court. *Id.*

3. In an action tried by the court, or by a referee, a refusal to find a material fact, of which there is legal proof, and where there is no proof to the contrary, nor proof of facts or circumstances showing its improbability, is an error of law, and if a request so to find is made and there is a refusal and exception, a proper question is presented for consideration in the Court of Appeals. *Beck v. Sheldon*. 865

4. Where a new trial is granted in an action tried by a jury, and the record shows that questions of fact were properly before the General Term for decision, and that the order for a new trial may or could have been based thereon, this court will not review it for the purpose of reversal. Resort cannot be had to the opinions of the General Term, but it must be ascertained and determined by the record alone, whether the order was granted on questions of fact or of law. *Downing v. Kelly*. 438

5. No appeal lies to this court from an order denying a motion for a new trial on the ground of surprise or newly discovered evidence. The question is one of discretion with the court below. *Donley v. Graham*. 658

6. An order of General Term in an equity action, sending the case back to the referee before whom it was tried, to decide upon the question of costs, cannot be reviewed in this court. *Taylor v. Root*. 687

7. Costs in an equity action are in the discretion of the court, and the exercise of this discretion cannot be reviewed. *Id.*

## See MOTIONS AND ORDERS, 2.

## PARTITION, 5.

*Bush v. Rochester City Bank* (Mem.), 659.

*Fitch v. Russell* (Mem.), 672.

*Divoll v. Henken* (Mem.), 672.

*Babcock v. Hermance* (Mem.), 683.

## ASSAULT AND BATTERY.

See *Green v. Kennedy* (Mem.), 653.

## ASSESSMENT AND TAXATION.

1. Since the act of 1851 (Laws of 1851, chap. 176), assessors are not bound by the affidavit presented by an owner of property taxed, upon complaint in relation to the assessment thereof. The affidavit is no longer conclusive, but is evidence to be considered by them, with other means of information in their power, and upon the whole their own judgment is to be formed as to the value of the property. *The People ex rel. v. Barker*. 70

2. In assessing the real estate of a railroad corporation, assessors are not required to assess it as an isolated piece of land, but each piece of property is to be estimated in connection with its position, its incidents, and the business and profits to be derived therefrom. *Id.*

3. The real estate of railroad corporations, occupied and used by them for railroad purposes, cannot properly be assessed as "non-resident lands." *Id.*
4. The provisions of the Revised Statutes for the assessment of taxes upon incorporated companies (1 R. S., 414, *et seq.*) furnish a sufficient basis for the assessment and taxation of the lands of railroad corporations, in those towns and counties remote from its principal place of business. *Id.*
5. The assessors in those towns are not required to make the entries upon their roll required for the purpose of fixing a basis of a tax upon the capital of the corporation. (Sub. 1 and 2, § 6, 1 R. S., 415.) Those directions are appropriate to the assessors of the town or ward where the principal place of business is located, upon whom the duty of assessing the capital is devolved. Where the duty is not devolved the directions are not applicable. *Held*, also, that within the provisions of the laws for the assessment and collection of taxes, railroad corporations are residents of the towns through which the railroad passes *Id.*
6. A railroad corporation which passes through and occupies lands in several counties for the carrying on of its corporate business, is, for the purposes of taxation, to be regarded as a resident of each town and county through which it passes. Its real estate is, therefore, properly assessed *in personam* as the land of a resident, and not as non-resident land. *The E. & S. L. R. R. Co. v. Supervisors.* 93
7. In cases where assessors have jurisdiction, they are to decide all questions of law as well as of fact. It is for them to determine, where there are facts calling for the exercise of their judgment, whether land is to be assessed as resident or non-resident land. Whatever may be their decision, they have the immunity of judicial officers. Both they and all persons who act upon their assessment in enforcing the tax are protected, and the tax after it has reached the treasury of the county cannot be collected back. The decision of the assessors cannot be attacked collaterally. *Id.*
8. A flagrant disregard of the facts or assessing in opposition to the clear and undisputed facts, where the application of the statute could not be doubtful, might present a case where the assessors would be without jurisdiction. *Id.*
9. It is not necessary that the affidavits of the assessors attached to the roll should comply literally with the statute. A substantial compliance is sufficient. *Id.*
10. By the statutes of this State, assessors are made the judges of the value of property for the purposes of taxation. They are not bound by proof produced before them, but are required to exercise their own judgment notwithstanding such proof, and the case must be an extraordinary one which will authorize the Supreme Court to review their judgment upon certiorari. *People ex rel. v. Trustees of Ogdensburg.* 390
11. If, however, the assessors place upon the roll property not liable to taxation, and they refuse upon the application of the person aggrieved to strike it off, their action can be reviewed upon certiorari. *Id.*
12. Where, at the time of the making out of an assessment roll, the agent of a non-resident has moneys belonging to his principal on deposit in bank, it is liable to be assessed and taxed, although, prior to the time appointed for correction of the roll, it has been withdrawn and used. *Id.*
13. Money due upon a contract for the sale of lands is personal property, and where such a contract belonging to a non-resident is in the hands of an agent who is a resident of an incorporated village, it may, for the purposes of municipal taxation, be assessed to the agent and taxed. *Id.*

- 14 The provisions of the act "to subject certain debts due to non-residents to taxation" (chap. 871 of the Laws of 1851), providing that debts due from inhabitants of this State to non-residents for the purchase of real estate shall be assessed in the name of the creditor and taxed in the town or county where the debtor resides, is applicable only to taxation in towns; and as to taxation in villages, the general law authorizing assessments to agents (1 R. S., chap. 18, title 1, § 6, as amended in 1851) remains in force. *Id.*
15. By the charter of the village of Ogdensburgh (as amended, chap. 63, Laws of 1865), in making out the assessment roll the trustees are required to follow the town assessment roll, adding thereto property which has been omitted, etc. The town assessors had assessed one P. for \$50,000 of personal property. He appeared before them and objected to the assessment upon the sole ground that he was a non-resident, and they struck it off. No assessment appeared upon that roll against his agents who had the property under their control. *Held*, that within the meaning of the charter the personal property was omitted and was properly added to the village assessment roll and assessed to the agents. *Id.*
16. Where lands are taken under a statute authority in derogation of common-law right, every requisite of the statute having a semblance of benefit to the owner must be complied with. *Newell v. Wheeler*. 486
17. Under the provisions of the "Act to consolidate the cities of Brooklyn, Williamsburgh," etc., passed in 1854 (chap. 384, Laws of 1854), an assessment for flagging sidewalks must be made against the owner of the premises benefited, unless the land be occupied by another, in which case it may be assessed to the occupant. If assessed to one who is neither owner nor occupant, the assessment is illegal, and a sale of the premises under it void. *Id.*
18. The provision of section 10, title 5 of said act, which provides that before issuing a warrant the assessment shall be examined and certified as correct by the street commissioner and attorney and counsel of the city, which certificate shall be conclusive evidence of the regularity of the proceedings, is only intended to cover the formal proceedings. These officers are not required to go back of the papers and records to ascertain if the persons named are in fact the owners or occupants, and their certificate is not conclusive upon this point. *Id.*
19. An action to cancel and annul a certificate of sale upon a void assessment is maintainable, when the defect does not appear upon the face of the proceedings. *Id.*
20. Assessors are *quasi* judicial officers; their assessments are in the nature of judgments. They are not subject to an action to review, modify or reverse their judgments, nor to hold them to personal liability, when acting within their jurisdiction. Their judgments can be reversed by action for fraud, mistake or other cause, giving jurisdiction to courts of equity; but it is the parties affected by the judgment who must be brought into court to litigate, not the judges. *W. R. R. Co. v. Nolan*. 513
21. The authority given to a tax collector by his warrant is special and exceptional, and must be pursued according to its terms. *First Nat. Bank of Salem v. Fancher*. 524
22. Where, upon an assessment roll, there appears an assessment against a stockholder in a bank for the amount of his stock, under the usual warrant attached, directing the collector to collect from the persons named, and to levy the same of their goods and chattels, the collector is not authorized to levy upon and collect the same of the property of the bank, although the bank holds funds with which the tax should have been paid. A contract between the bank and its stockholders cannot thus be enforced. *Id.*



23. An assessment upon the shares of a national bank, under the act of 1865 (sec. 10, chap. 97, Laws of 1865), is invalid and cannot be enforced. *Id.*

*See* LEASE, 3, 5, 6.

### ASSIGNMENTS.

1. In an assignment of an executory contract for the sale of land, there is no implied covenant on the part of the assignor of title to the land in the vendor; all that can be implied is a warranty that the assignor owned the contract, and had the right to assign it, and that the signatures thereto are genuine. *Thomas v. Bartow.* 193
2. Where the vendor's relation to the title is such that it is possible and feasible for him to perform the contract, and the assignee is placed in such a relation thereto that he can compel performance, the latter cannot repudiate a contract made by him in consideration of the assignments, on the ground of failure of consideration. *Id.*
3. The drawing of a draft or check upon a banker holding funds of the drawer does not operate as an assignment of such funds. *Tyler v. Gould.* 683

*See* BANKS AND BANKING, 10, 11.  
CONVERSION, 2.  
PARTNERSHIP, 8.  
STATUTE OF FRAUDS, 2.

### ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. An insolvent partnership made an assignment of its property and effects for the benefit of creditors; one of the creditors brought an action in his own behalf, and that of others who should come in and claim the benefit thereof, against the assignees for an accounting and distribution of the trust fund, in which action an order was entered appointing a referee to take and

state the account of the assignees, and to report the amount due such creditors as should come in under the order and seek the benefit of the action, and directing the publication of notices to the creditors to come in and exhibit their demands, which order was complied with, and upon the coming in and confirmation of the report of the referee an order was made for the distribution of the fund, which was fully executed by the assignees.

*Held*, that, in the absence of fraud, all the creditors of the assignor were bound by the decree, whether they came in and proved their claims or not, and that a creditor who failed to do this was barred, although he had no notice of the action, and knew nothing of it until after the distribution of the trust fund; also *held*, that it was not the duty of the assignees, having knowledge of the claim of a creditor who did not appear, to produce and prove such claim before the referee. *Kerr v. Blodgett.* 62

2. An assignee for the benefit of creditors can maintain an action, in his individual character, to recover a claim due the assignor; he is not required to sue as trustee. *Hogland v. Trask.* 636

*See* Smith v. Fox (Mem.), 674.

### AUCTION.

*See* CHATTEL MORTGAGE, 1.

### BAIL.

1. In an action for the recovery of possession of personal property, the defendant was arrested under the provisions of subdivision 8 of section 179 of the Code, and, upon giving the undertaking required by section 187, in such cases, was released from arrest by the sheriff, who thereupon returned the order of arrest to plaintiff's attorney. Plaintiff excepted to the bail; they failed to justify, but prior to the expiration of the time for justification, surrendered the de-

defendant to the sheriff, in whose custody he remained. Plaintiff subsequently recovered judgment for the delivery of the property, or payment of its value, with costs. *Held*, that the surrender by the bail was unauthorized, and did not exonerate them, and that, under section 201 of the Code, the sheriff was liable as bail; which liability was not satisfied by having the defendant within his custody, amenable to process, but that, as far as the plaintiff was concerned, he stood in the place of the bail in the undertaking given to him, and the extent of his liability was measured by theirs. *McKenzie v. Smith.* 143

2. Defendant was the nominal owner of a steam-tug. A., the real owner, managed her as master, exercised entire control over her, and received all her earnings. She was libeled in the District Court of the United States, and seized at Buffalo, for a penalty incurred by carrying passengers without a license. A. procured plaintiff to become bail for her discharge. A decree was rendered for the penalty, and plaintiff became bail upon an appeal bond, conditioned that defendant should pay "all such costs and expenses" as should be awarded against him. The decree was affirmed, and plaintiff paid the amount of the execution thereon. All this was without communication or consultation with defendant, who resided in the city of New York. Plaintiff brought this action to recover back the money paid, basing it upon the appeal bond. *Held*, 1st, that plaintiff made the payment, not as surety upon the appeal bond, but as defendant in the decree, which was *in personam* against him as surety upon the first bond; also, that as the appeal bond was not conditioned to pay damages there could be no recovery for the amount of the decree; 2d, that as the vessel was in a home port, and defendant near enough to be consulted, there being no pressing emergency, the master could not bind him. *Gager v. Babcock.* 154

## BAILMENTS.

1. A bailee of property, to which there are adverse claimants, has the right to refuse to deliver the same for such reasonable time as will enable him in good faith to investigate the facts as to the real ownership thereof. But after such time has elapsed, and after the owner has offered to give a bond of indemnity satisfactory to the bailee, a refusal to deliver the property is a conversion. *Ball v. Loney.* 6
2. If such bailee desires to relieve himself from the embarrassment of conflicting claims and from the responsibility of deciding between them, he can do so by commencing a suit in the nature of a bill of interpleader against the different claimants, and thus have their rights to the property judicially determined. *Id.*
3. Defendant had in his possession as bailee certain property belonging to plaintiff, which he refused to deliver up on demand. Subsequent to such refusal the property was seized and sold by virtue of an execution against one G., and the proceeds applied in satisfaction thereof. The sheriff, at the same time, had in his hands an execution against plaintiff, but nothing was done by virtue thereof. In an action for the conversion,—*Held*, that the fact that such execution was in the hands of the sheriff was not proper to be considered in mitigation of damages. *Id.*
4. The proposition that a bailee cannot deny the title of his bailor does not apply to a case where the bailee has been compelled by action, of which the bailor had notice, to pay for the property to one having the true title. *Cook v. Holt.* 275

## BANKS AND BANKING.

1. The cashier of a bank is bound to exercise reasonable skill and ordinary care and diligence in the performance of his duties. If he fails

- in such skill or omits such care and diligence, and the bank suffers damage in consequence, he is liable. *Commercial Bank v. Ten Eyck.* 305
2. In the absence of fraud or collusion, he is not liable to the bank for an act done under the direction of its president, the managing officer, under circumstances which do not disclose any absence of due care and diligence upon his part. *Id.*
3. The provisions of section 8 of the act in relation to moneyed corporations (1 R. S., p. 591), which provide that no conveyance, etc., of the real estate and effects of such corporation, exceeding \$1,000 in value, shall be made, unauthorized by a previous resolution of the board of directors, do not apply to a sale, by the financial officers of a bank, of mortgages or other securities pledged to secure a loan, made to realize the money secured by the pledge. *Id.*
4. Where the transaction is in reality a loan upon sufficient security, if loss is sustained, a cashier is not liable for permitting it to be done in the form of an overdraft. *Id.*
5. A cashier forwarded certain securities, belonging to his bank, to responsible brokers for sale, drawing against them for a portion of their value, which draft was accepted and paid. He negligently omitted to inquire after the securities or to collect the balance realized on sale thereof. The brokers, with knowledge that the bank had an interest therein, wrongfully applied such balance upon a claim against a third person. In an action against the cashier (the brokers remaining responsible),—*Held* that, as the brokers were liable to the bank for the balance, it sustained no damage from the cashier's negligence, and he, therefore, was not liable. *Id.*
6. A certificate of deposit issued by a bank is not a contract but an evidence of debt; it is in the nature of a receipt, and parol evidence is

admissible to explain it, the same as in case of a receipt. *Hotchkiss v. Mosher.* 478

7. Plaintiff paid to defendants, who were bankers, the amount of certain notes held by them, which were guaranteed by him, for the purpose of taking up the same; the notes, being made payable at defendants' bank, were left with them for collection. As a voucher of the transaction, defendants delivered to plaintiff a certificate of deposit for the amount paid for the notes. In an action of trover for the conversion of the notes,—*Held*, that the referee was justified in finding that the certificate was a voucher that plaintiff had paid the money for the notes, thus giving it the character and effect ascribed to it by defendants. He was also justified in refusing to find that the money paid was a deposit. *Id.*
8. The naming of a bank in a promissory note as the place of payment, does not make the banking association an agent for the collection of the note or the receipt of the money. No power, authority or duty is thereby conferred upon it in reference to the note. *Hills v. Place.* 520
9. Where, upon an assessment roll, there appears an assessment against a stockholder in a bank for the amount of his stock, under the usual warrant attached, directing the collector to collect from the persons named, and to levy the same of their goods and chattels, the collector is not authorized to levy upon and collect the same of the property of the bank, although the bank holds funds with which the tax should have been paid. A contract between the bank and its stockholders cannot thus be enforced. *First Nat. Bank of Salem v. Fancher.* 524
10. The legal title to the stock of a bank passes by an assignment and delivery of the certificate therefor, although there be no transfer upon the books of the bank. *Leitch v. Wells.* 585

11. The drawing of a draft or check upon a banker holding funds of the drawer does not operate as an assignment of such funds. *Tyler v. Gould*. 682

See CONSIGNOR AND CONSIGNEE, 1.  
EXECUTORS AND ADMINISTRATORS, 3.  
PAYMENT.

### BILLS, NOTES, CHECKS.

1. The naming of a bank in a promissory note as the place of payment, does not make the banking association an agent for the collection of the note or the receipt of the money. No power, authority or duty is thereby conferred upon it in reference to the note. *Hills v. Place*. 520
2. No presentment at the place named is necessary to give a right of recovery against the maker. It only relieves him from damages if he was ready at the time and place named to pay it, and there was no one to receive it. Such readiness is equivalent to a tender, and an answer pleading that fact, and payment of the money then due into court, will be a bar to the recovery of interest and costs, but not to the cause of action. *Id.*
3. Where, therefore, the maker has put funds in the bank sufficient to pay the note when due, and has given instructions to pay upon presentation, but, the note not having been presented at maturity, has thereafter withdrawn the funds and has not brought the money into court, the owner of the note is entitled to judgment thereon for both principal and interest. *Id.*
4. Where, in a copartnership agreement between A. and B., no firm name is expressly adopted, but A. is to give his personal attention to and have entire control and management of the business, with authority to arrange and negotiate the acceptance of drafts, B. to incur no risks and to assume no responsibility, it is a fair inference that the copartnership business is

to be done in the name of A., and B. is liable upon a draft drawn by A. in his individual name, procured to be discounted by him for the benefit of the firm, and avails applied to its use, although at the time the draft was discounted B. was not known to the payee as a partner. (GRAY, C., dissenting.) *Ontario Bank v. Hennessey*. 643

5. The drawing of a draft or check upon a banker holding funds of the drawer does not operate as an assignment of such funds. *Tyler v. Gould*. 682

See BANKS AND BANKING, 8.  
CAUSE OF ACTION, 9.  
CONSIGNOR AND CONSIGNEE, 1.  
FORMER ADJUDICATION, 2.  
PARTNERSHIP, 3.  
*Douglass v. Dudley* (Mem.), 688.

### BILL OF LADING.

See CONSIGNOR AND CONSIGNEE, 1, 2.

### BONDS.

See SHIPPING, 4, 5.  
*W. & O. Col. Institute v. Blackmar* (Mem.). 663  
*Schott v. Schwartz* (Mem.). 668

### BOUNTIES.

1. The town of W. voted a bounty to each individual who should volunteer and be credited upon its quota under a call of the president. Prior to the town meeting when the bounty was voted, McM. had enlisted and been mustered in as a substitute for defendant, but the latter had paid him nothing. K. paid to McM. the amount of the town and county bounties, and took from him an assignment of his claim therefor. Defendant assented to K.'s right to receive them. Subsequently defendant demanded and received of the supervisor of W. the bonds of the town for the amount of the bounty to McM. In an action by an assignee of K.

for an alleged conversion of the bonds,—*Held*, 1st, that the ratification and acceptance by the town of the credit given it by McM.'s enlistment was a sufficient consideration for its promise to pay the bounty, and he and his assigns became thereby legally entitled to the bonds issued therefor. 2d. Defendant having received them without claim of right was liable to an action for their conversion. *Carver v. Oregua*. 385

2. The control conferred upon congress, by the Constitution of the United States (art. 1, § 8), over the State militia, begins when they are mustered into the service of the United States. Arrangements by the States to procure or aid in calling them forth are not unauthorized, nor are regulations, fixing and limiting the amount of bounties, or rewards given to procure their services; therefore, section 4, of chapter 29, of the Laws of 1865, which prohibits the payment of any sums for the procurement of volunteers, save as provided for by that act, is not in conflict with the Constitution of the United States, and an agreement to pay a sum prohibited by that section is void. *Powers v. Shepard*. 540

BROKER.

See *Douglass v. Dudley* (Mem.), 688.

BROOKLYN, CITY OF.

See STATUTES, 5, 6.

BUFFALO, CITY OF.

See SUPERIOR COURT OF CITY OF BUFFALO.

CASES REVERSED, OVERRULED, QUESTIONED, CRITICISED OR EXPLAINED.

*Ball v. Liney* (44 Barb., 505), reversed. *Ball v. Liney*. 6

*Green v. Putnam* (1 Barb., 500), distinguished. *Scott et al. v. Guernsey et al.* 123

*Walden v. Davison* (15 Wend., 575), explained. *James v. Gurley*. 166

*Booth v. Bunce* (24 N. Y., 592), distinguished. *Smith v. Van Olinda*. 171

*Kellogg v. Richards* (14 Wend., 116), distinguished and explained. *Ryan v. Ward et al.* 207

*Jackson v. Matsdorf* (11 John., 91), explained. *Everett v. Everett*. 223

*Ring v. Whitely* (10 Paige, 465), explained. *Thorp v. Kookuk Coal Co.* 257

*Livingston v. Livingston* (4 John. Ch., 294), distinguished. *Central Bank, Troy, v. Heydorn*. 265

*Potter v. Cromwell* (40 N. Y., 287), explained and criticised. *Voorhees et al. v. McGinnis et al.* 282

*Ferris v. Kilmer* (47 Barb., 411), reversed. *Ferris v. Kilmer*. 301

*Happy v. Mosher* (47 Barb., 501), reversed. *Happy v. Mosher*. 318

*Dole v. Bull* (3 John. Cases, 289) explained. *Richardson v. Crandall*. 359

*Patrick v. Metcalf* (87 N. Y., 882), and *Butterworth v. Gould* (41 id., 450), distinguished. *Carver v. Oregua*. 389

*Chapman v. City of Brooklyn* (40 N. Y., 872), explained. *Newell v. Wheeler*. 490

*Murray v. Burling* (10 John., 172), distinguished. *Salt Springs Nat. Bank v. Wheeler*. 497

*City of Utica v. Churchill* (38 N. Y., 161), overruled. *First Nat. Bank of Sandy Hill v. Fancher*. 524

*Jacques v. Marquand* (5 Cow., 497), and *Tullmudge v. Penoyer* (35 Barb.,

120), distinguished and explained. *Ontario Bank v. Hennessey*. 551

*Keenholts v. Becker* (8 Denio, 846), questioned. *Basell v. Elmore*. 567  
*Seymour v. Wilson* (14 N. Y., 567), and *Cortland v. Herkimer* (44 id., 22), distinguished. *Waugh v. Fielding et al.* 681

#### CAUSE OF ACTION.

1. Defendant was the nominal owner of a steam-tug. A., the real owner, managed her as master, exercised entire control over her, and received all her earnings. She was libeled in the District Court of the United States, and seized at Buffalo, for a penalty incurred by carrying passengers without a license. A. procured plaintiff to become bail for her discharge. A decree was rendered for the penalty, and plaintiff became bail upon an appeal bond, conditioned that defendant should pay "all such costs and expenses" as should be awarded against him. The decree was affirmed, and plaintiff paid the amount of the execution thereon. All this was without communication or consultation with defendant, who resided in the city of New York. Plaintiff brought this action to recover back the money paid, basing it upon the appeal bond. *Held*, 1st, that plaintiff made the payment, not as surety upon the appeal bond, but as defendant in the decree, which was *in personam* against him as surety upon the first bond; also, that as the appeal bond was not conditioned to pay damages there could be no recovery for the amount of the decree; 2d, that as the vessel was in a home port, and defendant near enough to be consulted, there being no pressing emergency, the master could not bind him. *Gager v. Babcock*. 154

2. The grantee in a simple quitclaim deed, in the absence of fraud or mistake, has no remedy for a failure of title against his grantor, nor has he any defence to an action for the consideration on the

ground of failure thereof. *Thorp v. Kookuk Coal Co.* 253

3. Defendant accepted a deed of certain premises containing a clause that it was made subject to a mortgage which the grantee thereby assumed and agreed to pay. The bonds accompanying the mortgage contained a condition that, in case of default, recourse must first be had to the lands mortgaged, and that the obligors would only be answerable for the deficiency. *Held*, that the mortgagee could maintain an action upon the implied covenant in defendant's deed, without first foreclosing the mortgage, and could recover the whole amount unpaid. *Id.*

4. The town of W. voted a bounty to each individual who should volunteer and be credited upon its quota under a call of the president. Prior to the town meeting when the bounty was voted, McM. had enlisted and been mustered in as a substitute for defendant, but the latter had paid him nothing. K. paid to McM. the amount of the town and county bounties, and took from him an assignment of his claim therefor. Defendant assented to K.'s right to receive them. Subsequently defendant demanded and received of the supervisor of W. the bonds of the town for the amount of the bounty to McM. In an action by an assignee of K. for an alleged conversion of the bonds,—*Held*, 1st, that the ratification and acceptance by the town of the credit given it by McM.'s enlistment was a sufficient consideration for its promise to pay the bounty, and he and his assigns became thereby legally entitled to the bonds issued therefor. 2d, defendant having received them without claim of right was liable to an action for their conversion. *Carver v. Oregon*. 385

5. A judgment creditor has a mere general, not a specific lien upon the debtor's real estate; he cannot therefore maintain an action for waste committed thereon. *Lanning v. Carpenter*. 408

6. If A. has agreed to sell property to B., C. may, at any time before the title has passed, induce A. to sell it to him instead, and, if not guilty of fraud or misrepresentation, he does not incur any liability, and this is so, although C. may have contracted to purchase the property of B. B. cannot maintain an action upon the latter contract, as he cannot perform, and can only look to A. for a breach of the former. *Ashley v. Dixon*. 430
7. An action to cancel and annul a certificate of sale upon a void assessment is maintainable, when the defect does not appear upon the face of the proceedings. *Newell v. Wheeler*. 486
8. An announcement made upon an auction sale of personal property, that it is sold subject to a chattel mortgage and that the purchaser will have to comply with the conditions thereof, does not impose a personal obligation upon a purchaser who hears and assents to the announcement, and an action cannot be maintained against him to recover the amount secured by the mortgage. *Hamill v. Gillespie*. 556
9. Where A. loans his note to B., upon the strength of C.'s promise that he will get it discounted and renewed from time to time until B. shall be able to meet it, C. is bound by the promise and A. can maintain an action against him thereon. But such a promise carries with it an implication, both that A.'s note shall be furnished for renewal before the one discounted becomes due, in season to be substituted therefor, so as to save C.'s indorsement from dishonor, and that in the event of B.'s ability to pay the note when due the obligation to procure a renewal shall cease. The neglect of B. to furnish a new note in time for renewal, or the ability of B. to pay, discharges C. from liability. *Brisbane v. Bebes*. 631
10. To entitle a judgment creditor to attack a disposition made of the

debtor's property, he must be able to show that the disposition was such that something remains of it or its proceeds, which ought to be applied upon his judgment. Where, therefore, one received from the debtor's wife the avails of his property in her hands with intent to defraud a creditor, with an agreement to retain or use it as the debtor and wife might want, but, before the recovery of judgment for the debt by the creditor, he has returned it or paid it out as directed by the debtor, and has settled with and been discharged from all claim by the latter, he is not liable to the judgment creditor therefor. *Cramer v. Blood*. 684

See BANKS AND BANKING, 1, 2, 4, 5.  
CLOUD ON TITLE, 1, 2, 3,  
CONTRACTS, 7, 9.  
LEASE, 8.  
PARTNERSHIP, 8, 4.

## CERTIORARI.

The remedy by certiorari is the proper one to review an assessment. *W. R. R. Co. v. Nolan*. 513

## CHATTEL MORTGAGE.

1. An announcement made upon an auction sale of personal property, that it is sold subject to a chattel mortgage and that the purchaser will have to comply with the conditions thereof, does not impose a personal obligation upon a purchaser who hears and assents to the announcement, and an action cannot be maintained against him to recover the amount secured by the mortgage. *Hamill v. Gillespie*. 556
2. While personal property covered by a mortgage remains in the possession of the mortgagor and its conditions are unbroken, the mortgagor's interest is subject to levy and sale upon execution, and the purchaser obtains the same title as that of which the mortgagor was

possessed. This interest he can lawfully sell, and no claim arises against him in favor of the mortgagor, from the fact that he attempts to sell or does sell a clear title. There is no wrong done the mortgagor thereby, as he may still pursue his lien under the mortgage and his rights remain the same. In an action, therefore, by the mortgagor against the purchaser, it is not error to exclude evidence of such a sale. *Id.*

*See* FIXTURES, 2.

CLOUD ON TITLE.

1. To constitute a cloud upon title, it is sufficient that there be a deed, valid upon its face, accompanied with a claim of title, under such circumstances that a court of equity can see that the deed is likely to work mischief to the real owner. It is not necessary, in order to maintain an action to remove the cloud and quiet the title, that the claimant should have a *prima facie* record title, which the real owner must call in extrinsic evidence to overthrow. *Fonda v. Sage*. ✓ 173
2. Plaintiff purchased and paid for certain real estate, directing the vendor to execute to her a deed conveying the same to her, with a proviso therein, that if her son should pay her \$200 per year during her life, he should have the property after her death. By mistake, the deed was so drawn as to grant the land to her in trust for her son, upon certain conditions, not being a trust recognized by the statute of uses and trusts. Plaintiff received the deed without examination, and did not discover the mistake for several months thereafter. When she did discover it, with the concurrence of her son, who refused to take under the deed, she returned it to her grantor, when the same was destroyed, and a new deed was executed and delivered to her, conveying the premises in fee; subsequently the premises were levied upon, adver-

tised and sold, under an execution against the son. The purchaser at the sheriff's sale claimed that the son had the title to the premises or an interest therein, which he had purchased, and this he threatened to enforce. *Held*, that there was not a valid and effectual delivery and acceptance of the first deed, so as to pass the title; that the son had no interest in the premises, and that an action to quiet the title could be maintained. *Id.*

3. Even if there was such a delivery, and the mistake could not be corrected without the aid of the court, the plaintiff remained the equitable owner, with rights superior to the purchaser at the sheriff's sale; and with all the necessary parties before it, the court could, in an action brought to quiet the title, establish plaintiff's title under the second deed, and annul any claim of title under the first. *Id.*
4. An action to cancel and annul a certificate of sale upon a void assessment is maintainable, when the defect does not appear upon the face of the proceedings. *Newell v. Wheeler*. 496
5. A defendant who claims under such a certificate and litigates the case cannot complain if the court, in the exercise of its discretion, impose upon him the costs. *Id.*

CODE OF PROCEDURE.

- § 61. *See* COSTS, 1.  
 § 122. *See* TRIAL, 3.  
 §§ 179, 187, 201. *See* SHERIFF, 1.  
 § 274. *See* PARTIES, 8.  
 §§ 292, 294. *See* SUPPLEMENTARY PROCEEDINGS, 1, 2.  
 § 449. *See* ELECTION OF REMEDIES, 1.

COLLECTOR (TAX).

- See* ASSESSMENT AND TAXATION, 21, 22.



COLOR OF OFFICE.

*See* OFFICE AND OFFICER, 2, 3, 4, 5.

COMMON CARRIER.

*See* EXPRESS COMPANIES, 1.  
PRINCIPAL AND AGENT, 5.  
RAILROAD CORPORATIONS, 6, 7,  
8, 9.  
STEAMBOATS, 1.  
TELEGRAPH COMPANIES, 1.  
*Redpath v. Vaughan* (Mem.), 655.  
*Gibbs v. Van Buren*, 661.

COMPLAINT

*See* PLEADING, 3, 4, 5, 6.

COMPROMISE.

1. Where, upon payment of a portion of an undisputed account, the creditor gives a receipt in full, he is not concluded thereby from recovering the balance, although the receipt was given with knowledge, and there was no error or fraud. *Ryan v. Ward*. 204
2. Upon the breach of a contract between the parties, defendants became liable to plaintiffs in damages to the amount of \$6,400, which amount was undisputed. Defendants being unable to pay, it was agreed that if they would borrow of their friends and pay the sum of \$3,500, plaintiffs would settle and compromise, leaving it to defendants' honor to pay, when they became able, an additional sum, which, with the \$3,500, would amount to seventy-five per cent of the claim. Defendants thereupon borrowed and paid to plaintiffs the \$3,500. *Held*, that there was no consideration for the agreement of compromise, and that the plaintiffs were not concluded from suing and recovering the residue. The question is not affected by the fact that defendants received from the lenders checks for the amounts borrowed, which they delivered to plaintiffs in lieu of the money. *Bunge v. Koop*. 225

CONGRESS.

*See* ACTS OF CONGRESS.

CONSIDERATION.

*See* BOUNTIES, 1.  
CONTRACTS, 8, 6.  
RAILROAD CORPORATIONS, 8.  
*Schott v. Schwartz* (Mem.), 666.

CONSIGNOR AND CONSIGNEE.

1. Where the consignor of property, upon its shipment and before delivery, draws a bill of exchange upon the consignee, and procures the same to be discounted at a bank upon the security of the bill of lading, which is transferred and delivered with it, the bank acquires title to the property described in the bill of lading, conditional upon the acceptance of the draft; upon such acceptance the title passes to the acceptor; but upon refusal to accept, the title continues unimpaired, and upon the receipt by the consignee of the property and its conversion, he is liable to the bank for the money advanced upon it. *Marine Bank v. Wright*. 1
2. Where the consignor is indebted to the consignee for advances, and has agreed to give him a prior security upon the property, the lien of the latter is good as against the former; but the consignee does not thereby obtain any right to the property, as against a *bona fide* pledgee of the bill of lading for value, made prior to the delivery of the property to the consignee. *Id.*
3. The consignor of goods to a distant consignee, who is the owner, is the agent of the consignee for the purposes of shipping. *Nelson v. H. R. R. Co.* 498

CONSTITUTIONAL LAW.

1. The provision in the State Constitution, that no person shall be deprived of property, etc., without

due process of law (art. 1, § 8), does not require a legal proceeding according to the course of the common law, nor must there be a personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on, and an opportunity offered him to defend. The opportunity to defend must not be colorable and illusory; but it matters not, though it may be difficult, so long as it is not impracticable. *Hoppy v. Mosher*. 818

2. The act of 1862 (chap. 482, Laws of 1862), providing for "the collection of demands against ships and vessels," is not repugnant to the above mentioned provision, as it provides a reasonable notice and gives an opportunity to litigate the lien. *Id.*

3. The control conferred upon congress, by the Constitution of the United States (art. 1, § 8), over the State militia, begins when they are mustered into the service of the United States. Arrangements by the States to procure or aid in calling them forth are not unauthorized, nor are regulations, fixing and limiting the amount of bounties, or rewards given to procure their services; therefore, section 4, of chapter 29, of the Laws of 1865, which prohibits the payment of any sums for the procurement of volunteers, save as provided for by that act, is not in conflict with the Constitution of the United States, and an agreement to pay a sum prohibited by that section is void. *Powers v. Shepard*. 540

See ASSESSMENT AND TAXATION, 28.

#### CONSTRUCTIVE NOTICE.

1. A purchaser of land is chargeable with notice by implication of every fact affecting the title, which would be discovered by an examination of the deeds or other muniments of title of his vendor, and, where he has knowledge of any facts

sufficient to put a prudent man upon an inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some rights or title in conflict with that he is about to purchase, the law will presume he made the inquiry, and will charge him with the notice he would have received if he had made it. *Cambridge Valley Bank v. Delano*. 326

2. No more than ordinary prudence and diligence is required, however; and where, therefore, the vendor's deed refers to an incumbrance upon the land, the fact that the incumbrance described was discharged of record prior to the execution of such deed, is not sufficient to charge a purchaser with constructive notice of the existence of another and entirely different lien, which nowhere appears upon record as a charge upon the premises. *Id.*

3. G. M. died seized of certain premises situate partly in Orleans and partly in Niagara counties. Upon a portion of the premises in Orleans county was a mortgage of \$2,160; upon a portion in Niagara was a nominal mortgage of \$1,690, which was inoperative, but recorded and an apparent lien. After the death of G. M., actual partition was made of the lands among the heirs, and, to equalize the division, the commissioners intended to charge upon two of the shares, which were portions of the lands in Niagara county, the payment of the \$2,160 mortgage, leaving the portion in Orleans county freed therefrom; but, by mistake, they named and described the \$1,690 mortgage, and the same mistake was repeated and included in the decree. D. contracted to purchase the shares in Niagara county, assuming and agreeing to pay the \$1,690 mortgage. Prior to his receiving deeds, the mistake was discovered, and upon the heirs making up the difference, D., by parol, assumed and agreed to pay the \$2,160 mortgage, and the \$1,690 mortgage was satisfied and discharged of record; but upon drawing the deed, the mistake was repeated and the lands were deeded to D., subject to

the \$1,690 mortgage. D. sold and conveyed, without mention of either mortgage. In an action brought by W., owning the premises in Orleans county, to relieve them of the \$2,160 mortgage, and to charge the mortgage debt primarily upon the lands in Niagara, —*Held*, that there was nothing appearing in the papers or upon the records sufficient to put D.'s grantee or subsequent grantees or mortgagees upon inquiry, or to charge them with constructive notice of the fact that the lands conveyed by D. were, as regards him, subject to the payment of said mortgage. *Id.*

*See Magaro v. Fielding et al.* (Mem.), 668.

### CONSTRUCTION.

Defendant agreed to convey to plaintiffs a house and lot in the city of New York. In the description contained in the contract, the lot was stated as "being in depth, on Clinton street, 120 feet, including the stable situated on the rear of said premises." He executed and delivered a deed to carry out the agreement, which followed the description contained therein, except omitting any reference to the stable. It was supposed, at the time of the execution of the contract and deed, that the stable was upon the 120 feet, but subsequently it was discovered that, in order to include the stable, the lot should be 181 feet and ten inches deep. In an action brought by plaintiffs for specific performance, —*Held*, that under the well settled rule that, in the construction of grants, courses and distances must yield to fixed, known monuments, plaintiffs were entitled to a deed that would include the land upon which the stable stands. *White v. Williams.* 844

*See* CONTRACTS, 23, 24.  
INSURANCE, FIRE.  
INSURANCE, LIFE.  
INSURANCE, MARINE, 4.  
LIBEL, 1.  
WILLS, 1.

### CONTRACTS.

1. A contract voluntarily signed and executed by a party, in the absence of misrepresentation or fraud, with full opportunity of information as to its contents, cannot be avoided upon the ground of his negligence or omission to read it, or to avail himself of such information. *Breese v. U. S. Tel. Co.* 182
2. In an assignment of an executory contract for the sale of land, there is no implied covenant on the part of the assignor of title to the land in the vendor; all that can be implied is a warranty that the assignor owned the contract, and had the right to assign it, and that the signatures thereto are genuine. *Thomas v. Bartow.* 193
3. Where the vendor's relation to the title is such that it is possible and feasible for him to perform the contract, and the assignee is placed in such a relation thereto that he can compel performance, the latter cannot repudiate a contract made by him in consideration of the assignments, on the ground of failure of consideration. *Id.*
4. The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice, printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried. *Rawson v. Pa. R. R. Co.* 212
5. If, however, the passenger's attention is called to it when purchasing his ticket, or if he knew of it when he purchased, the law will presume, in the absence of any objection upon his part, that he assented to the terms. The contract is made, and rights and duties of the parties are determined, when the ticket is purchased. A discovery by the passenger of the notice after he has entered upon his journey does not affect his rights. *Id.*
6. Upon the breach of a contract between the parties, defendants became liable to plaintiffs in damages to the amount of \$6,400, which amount was undisputed. Defendant

- ants being unable to pay, it was agreed that if they would borrow of their friends and pay the sum of \$3,500, plaintiffs would settle and compromise, leaving it to defendants' honor to pay when they became able an additional sum, which, with the \$3,500, would amount to seventy-five per cent of the claim. Defendants thereupon borrowed and paid to plaintiffs the \$3,500. *Held*, that there was no consideration for the agreement of compromise, and that plaintiffs were not concluded from suing and recovering the residue. The question is not affected by the fact that defendants received from the lenders checks for the amounts borrowed, which they delivered to plaintiffs in lieu of the money. *Bunge v. Koop.* 225
7. Where, prior to the time for the performance of a contract, one of the parties notifies the other that he will not perform, the latter can maintain an action for the breach without an offer of performance upon his part. *Id.*
8. Two instruments, executed at the same time, and relating to the same subject-matter, must be construed together as if one instrument. *The M. B. Co. v. Zingsen.* 247
9. Where it appears, by the terms of an agreement or the nature of the case, that the performance of one party was to precede that of the other, an action can be maintained against him who was to do the first act, although nothing has been done or offered by the other. *Id.*
10. Defendant agreed to convey to plaintiffs a house and lot in the city of New York. In the description contained in the contract, the lot was stated as "being in depth, on Clinton street, 120 feet, including the stable situated on the rear of said premises." He executed and delivered a deed to carry out the agreement, which followed the description contained therein, except omitting any reference to the stable. It was supposed, at the time of the execution of the contract and deed, that the stable was upon the 120 feet, but subsequently it was discovered that, in order to include the stable, the lot should be 131 feet and ten inches deep. In an action brought by plaintiffs for specific performance,—*Held*, that under the well-settled rule that, in the construction of grants, courses and distances must yield to fixed, known monuments, plaintiffs were entitled to a deed that would include the land upon which the stable stands. *White v. Williams.* ✓ 344
11. Where a manufacturer of goods, which are known in the market, and the different qualities distinguished by numbers, contracts to sell and deliver goods from his factory, of certain numbers, in an action upon the contract it is not material whether the goods delivered are of equal or inferior quality to those of corresponding numbers, manufactured at other factories, or whether they are or are not merchantable. If they are the numbers contracted for as manufactured at the contractor's factory, the contract is fulfilled. *Beck v. Sheldon.* 365
12. In executory contracts for the sale of personal property, if the vendee deems the article received not the one contracted for, to preserve his rights he must return it to the vendor, or notify him of his objections and offer to return it. The retention of the property, without doing this after opportunity to ascertain the defect, is an admission that the contract has been performed. *Id.*
13. Parties cannot, by agreement, convert a judgment into a personal mortgage or a bill of sale, or give to it any greater effect than the law gives to it. A parol agreement, therefore, that a judgment shall be a lien upon all the debtor's personal property, will not be enforced in equity, even as against subsequent assignees who assented to the arrangement. (*EARL, C.*) *Lanning v. Carpenter.* 408
14. It was agreed between a debtor and his creditors that he should give the latter security for their

- respective claims by confessing judgment, the judgment in favor of one creditor to be first entered and to have priority of lien upon all the property, real and personal, of the debtor. The judgments were entered in Schuyler county, as agreed, all parties supposing that county to be legally organized. It was subsequently decided that Schuyler county was not constitutionally organized, and that the judgment should have been docketed in Steuben. In an action brought by the preferred creditor to establish his equitable lien,—*Held*, that, as between the parties, the plaintiff was entitled to the same position that he would have occupied had his judgment been docketed in the proper county; but he was not entitled to a lien upon timber cut upon the debtor's real estate after the docketing of the judgment, and transferred by the latter to the other creditors to be applied upon their judgments before the issuing of execution upon plaintiff's judgment. Also *held* (EARL, C.), that plaintiff had no lien upon the debtor's personal property which had been so transferred prior to the issuing of his execution. *Id.*
15. Defendant agreed to run plaintiff's boat from Oswego to Martinsburgh; "risks of navigation" assumed by plaintiff. Defendant was prevented from performing by the fact that the boat was too large to pass through the locks on the Black River canal. *Held*, that the term "risks of navigation," as used in this agreement, had a broader signification than "perils of navigation," and that plaintiff assumed all the risks attendant upon the navigation through the canal which were beyond the control of defendant, including the risk in question. *Pitcher v. Hennessy.* 415
16. If A. has agreed to sell property to B., C. may, at any time before the title has passed, induce A. to sell it to him instead, and, if not guilty of fraud or misrepresentation, he does not incur any liability, and this is so, although C. may have contracted to purchase the property of B. B. cannot maintain an action upon the latter contract, as he cannot perform, and can only look to A. for a breach of the former. *Ashley v. Dixon.* 480
17. A covenant in a lease whereby the lessee agrees to bear, pay and discharge all taxes and assessments which shall be imposed upon the demised premises during the term, is broken when the lessee neglects to pay a tax or assessment duly imposed. It is not simply a contract of indemnity, but by it the tax or assessment, as between the parties, becomes the debt of the lessee. The lessor therefore can maintain an action thereon without first paying the tax or assessment, and as damages he is entitled to recover the amount of such tax or assessment. *Rector, etc., of Trinity Church v. Higgins.* 532
18. Parties have the right to make a contract contravening the rule that actual compensation will only be given for actual loss, and when the intent so to do is expressed in apt and suitable language courts of justice will enforce it. *Id.*
19. The fact that neither the particular tax or assessment, nor the time of payment, nor the person or corporation to whom payable are stated in the covenant, does not make it one for indemnity merely. That is certain which is capable of being rendered certain. *Id.*
20. Nor is it an objection that there is a risk attendant upon the payment of the judgment without prepayment of the tax or assessment. The lessee can make payment even after judgment, and upon application to the court after such payment the collection of the judgment, except as to costs, will be stayed, and upon payment of costs satisfaction will be ordered. *Id.*
21. Where A. loans his note to B., upon the strength of C.'s promise that he will get it discounted and renewed from time to time until B. shall be able to meet it, C. is bound by the promise, and A. can

- maintain an action against him thereon. But such a promise carries with it an implication, both that A.'s note shall be furnished for renewal before the one discounted becomes due, in season to be substituted therefor, so as to save C.'s indorsement from dishonor, and that in the event of B.'s ability to pay the note when due the obligation to procure a renewal shall cease. The neglect of B. to furnish a new note in time for renewal, or the ability of B. to pay, discharges C. from liability. *Brisbane v. Bebe*. 686
22. A written instrument not under seal is inoperative and ineffectual to pass the legal title to lands. *Morris v. Salisbury*. 686
23. Where an agreement is executed in duplicate, if there are variances between the two instruments, they are to be construed together in determining the meaning of the parties. One cannot be regarded as more expressive of the intent of the parties than the other, but they are entitled to equal faith and credit. The want of accuracy in the one is not proven by the mere production of the other. The intent is to be arrived at by an examination of the terms and provisions which are identical in each, thus determining the objects and purposes contemplated. And where the contract bears such inherent evidence of its true meaning that it carries a clear legal conviction, evidence of the intention of the parties or of surrounding circumstances is properly excluded. *Id.*
24. Plaintiff claimed a title under a contract executed in duplicate between M. & Co. (of which firm plaintiff was a member) and B. The instrument delivered to M. & Co. purported to convey to them "all the land and timber, except the hard wood, on one hundred acres of land;" in that delivered to B. the words were "bark and timber;" aside from this the two were identical. The scope and tenor of the contract indicated that the land itself was not intended to be conveyed. *Held*, that the title of B. to the land was not divested,
- and that the possession of plaintiff was subordinate thereto. Also, that evidence that the price paid by M. & Co. was the full value of the land, bark and timber together, except the hard wood, was immaterial, and its exclusion no error. *Id.*
- See CONSTITUTIONAL LAW, 3.  
CORPORATIONS.  
EXPRESS COMPANIES, 1.  
INSURANCE, LIFE.  
INSURANCE, MARINE.  
OFFICE AND OFFICER, 1, 2, 7.  
PARTNERSHIP, 1, 2.  
RAILROAD CORPORATIONS, 8, 9.  
SALES.  
STATUTE OF FRAUDS.  
TELEGRAPH COMPANIES, 2, 3.  
TENANTS IN COMMON.  
*Wilder v. Stearns* (Mem.), 656.  
*Gibbs v. Van Buren* (Mem.), 661.  
*Brackett v. Wyman* (Mem.), 667.
- ### CONTRIBUTION.
- See *Douglass v. Dudley* (Mem.), 688.
- ### CONVERSION.
1. A bailee of property, to which there are adverse claimants, has the right to refuse to deliver the same for such reasonable time as will enable him in good faith to investigate the facts as to the real ownership thereof. But after such time has elapsed, and after the owner has offered to give a bond of indemnity satisfactory to the bailee, a refusal to deliver the property is a conversion. *Ball v. Liney*. 6
  2. B. gave to G. a verbal order for a bill of furniture to be shipped to B. at Milwaukee; prior to its arrival B. left Milwaukee, leaving word that the furniture be returned to G. Upon the arrival of the furniture at Milwaukee it was seized by the sheriff as the property of B. by virtue of a writ of attachment against him. While in the possession of the sheriff G. assigned his interest therein to plaintiff. After the assignment, judgment was perfected in the ac-

tion, wherein the attachment was issued and execution issued thereon. By virtue thereof the sheriff levied upon and sold the property under the directions of defendant, the judgment creditor. No demand for the goods was made by plaintiff. *Held*, that the seizure of the property, by virtue of the attachment, did not change the title; it remained in G., and was transferred to plaintiff. Every fresh interference therewith was a new wrong, and the seizure and sale thereof by virtue of the execution was a conversion, for which plaintiff could recover. *Hicks v. Cleveland.* 84

3. A demand and refusal to deliver do not establish a conversion, where, at the time of the demand, the property in question is not in existence. *Salt Springs National Bank v. Wheeler.* 492

4. The accidental loss or destruction of an article, by one lawfully in its possession, is not a conversion. *Id.*

See CAUSE OF ACTION, 4.  
*Pike v. Walter* (Mem.), 681.

## CONVEYANCE.

See COVENANT, 2, 3.  
DEEDS.

## CORPORATIONS.

The salary allowed to an officer of a corporation is presumed to be for services to be performed by him as such. Where, therefore, with the assent and co-operation of such officer, all the property business and franchises of the corporation are sold, so that he has no further duty to perform, there is no basis in law or equity for a claim, upon his part, that the salary continues, and the contract, as to salary, will be deemed to be canceled, although the corporation itself is not dissolved. *L. I. Ferry Co. v. Terbell.* 427

See BANKS AND BANKING.  
EXPRESS COMPANIES.  
INSURANCE, FIRE.  
INSURANCE, LIFE.  
INSURANCE, MARINE.  
PLANKROAD COMPANIES.  
RAILROAD CORPORATIONS.

## COSTS.

1. In an action of trespass in Justice's Court, defendant pleaded title to a portion of the premises; that action was thereupon discontinued and one commenced in the Supreme Court, wherein the pleadings were substantially the same. Defendant succeeded on the issues affecting the premises as to which title was pleaded. Neither possession of nor title to the residue was made a question upon the trial by defendant, and the amount of the recovery for trespass thereon was less than fifty dollars. *Held*, that under section 61 of the Code, the costs in such case are to be governed by the decision and judgment on the issue presented by the plea of title; that plaintiff, by claiming title to land not owned by him, caused all the costs which accrued in the Supreme Court; he, therefore, could not recover costs, but was properly chargeable with defendant's. *Mores v. Salisbury.* 636

2. Costs in an equity action are in the discretion of the court, and the exercise of this discretion cannot be reviewed. *Taylor v. Root.* 687

See CLOUD ON TITLE, 5.  
JURISDICTION, 2.

## COUNTER CLAIM.

See *Smith v. Fox* (Mem.), 674.

## COUNTY COURT.

The County Court has jurisdiction to order a receiver appointed by it, in proceedings supplementary to execution, to release to the debtor a judgment recovered by

him for an unlawful seizure and sale of exempt property. *Willotson v. Wolcott*. 188

### COVENANTS.

1. Defendant accepted a deed of certain premises containing a clause that it was made subject to a mortgage, which the grantee thereby assumed and agreed to pay. The bonds accompanying the mortgage contained a condition that, in case of default, recourse must first be had to the lands mortgaged, and that the obligors would only be answerable for the deficiency. *Held*, that the mortgagee could maintain an action upon the implied covenant in defendant's deed, without first foreclosing the mortgage, and could recover the whole amount unpaid. *Thorpe v. Keokuk Coal Co.* ✓ 253

2. In an action to recover a rent charge reserved by the grantor and covenanted to be paid by the grantee in a conveyance in fee, seizin in the grantor is well established, so far as one holding under the grantee is concerned, by the fact that the grantee entered in allegiance to the grantor's title, out of which the rent is reserved; and, until something is shown to the contrary, the relations created by the covenants in the deed are presumed to have continued. Unless, therefore, some one bound by the covenant to pay rent has paid it, or has been released therefrom, the action is well brought, and the production and proof of the covenant, in the absence of proof of payment or release, entitles the grantor or his assignee to a finding that the rent for twenty years (if the covenant has been so long executed) remains unpaid, and to a judgment therefor. The law presumes payment prior to that time, but no presumption arises, from the absence of proof of such payment, that the rents have been extinguished, and the grantee and assignees released from the covenant. (HUNT, C., dissenting.) *Central Bank v. Heydorn*. 260

3. Even proof of non-payment of rent for a period of sixty-three years would not raise a presumption of such release of sufficient strength to establish the fact conclusively as a proposition of law, when the covenant sued upon remains in the possession of plaintiff, uncanceled, and is produced and read in evidence. *Livingston v. Livingston*, 4 J. Ch., 204, distinguished. (GRAY, C.) *Id.*

4. A covenant in a lease whereby the lessee agrees to bear, pay and discharge all taxes and assessments which shall be imposed upon the demised premises during the term, is broken when the lessee neglects to pay a tax or assessment duly imposed. It is not simply a contract of indemnity, but by it the tax or assessment, as between the parties, becomes the debt of the lessee. The lessor, therefor, can maintain an action thereon without first paying the tax or assessment, and, as damages, he is entitled to recover the amount of such tax or assessment. *Rector, etc., Trinity Church v. Higgins*. ✓ 532

*See DEEDS*, 3.

### DAMAGES.

1. After a conversion of property, the title still remains in the owner, and the property can be taken from the wrong-doer upon an execution against the owner in favor of a third person, sold, and the proceeds applied upon the owner's debt. In such case the wrong-doer can set up the seizure and sale in mitigation of damages. It is not the fact of the seizure which gives the defence, but that the property has been seized under such circumstances that the owner has had or could have the benefit of it. *Ball v. Linoy*. 6
2. Defendant had in his possession as bailee certain property belonging to plaintiff, which he refused to deliver up on demand. Subsequent to such refusal the property was seized and sold by virtue of an execution against one G., and the



proceeds applied in satisfaction thereof. The sheriff at the same time had in his hands an execution against plaintiff, but nothing was done by virtue thereof. In an action for the conversion,—*Held*, that the fact that such execution was in the hands of the sheriff was not proper to be considered in mitigation of damages. *Id.*

See BANKS AND BANKING, 5.  
BILLS, NOTES, CHECKS, 2, 3.  
LEASE, 8.  
*Krom v. Levy* (Mem.), 679.

## DEBTOR AND CREDITOR.

1. Where upon payment of a portion of an undisputed account, the creditor gives a receipt in full, he is not concluded thereby from recovering the balance, although the receipt was given with knowledge, and there was no error or fraud. *Ryan v. Ward.* 204
2. Upon the breach of a contract between the parties, defendants became liable to plaintiffs in damages to the amount of \$6,400, which amount was undisputed. Defendants being unable to pay, it was agreed that if they would borrow of their friends and pay the sum of \$3,500, plaintiffs would settle and compromise, leaving it to defendants' honor to pay when they became able an additional sum, which, with the \$3,500, would amount to seventy-five per cent of the claim. Defendants thereupon borrowed and paid to plaintiffs the \$3,500. *Held*, that there was no consideration for the agreement of compromise, and that plaintiffs were not concluded from suing and recovering the residue. The question is not affected by the fact that defendants received from the lenders checks for the amounts borrowed, which they delivered to plaintiffs in lieu of the money. *Bunge v. Koop.* 225
3. To entitle a judgment creditor to attack a disposition made of the debtor's property, he must be able to show that the disposition was such that something remains of it

or its proceeds, which ought to be applied upon his judgment. Where, therefore, one received from the debtor's wife the avails of his property in her hands with intent to defraud a creditor, with an agreement to retain or use it as the debtor and wife might want, but, before the recovery of judgment for the debt by the creditor, he has returned it or paid it out as directed by the debtor, and has settled with and been discharged from all claim by the latter, he is not liable to the judgment creditor therefor. *Cramer v. Blood.* 684

See JUDGMENTS, 6.

## DEEDS.

1. When one purchases land, and at his request the same is deeded to another, although the purchaser receives and retains the deed, without disclosing the existence thereof to the grantee, and takes and retains possession of the land, yet by the deed the title passes and becomes vested in the grantee, and under the prohibitions of the statute of uses and trusts (1 R. S., 728, § 51) no trust results in favor of the purchaser. *Everett v. Everett.* 218
2. The grantee in a simple quitclaim deed, in the absence of fraud or mistake, has no remedy for a failure of title against his grantor, nor has he any defence to an action for the consideration on the ground of failure thereof. *Thorp v. Keokuk Coal Co.* 253
3. Defendant accepted a deed of certain premises containing a clause that it was made subject to a mortgage which the grantee thereby assumed and agreed to pay. The bonds accompanying the mortgage contained a condition that, in case of default, recourse must first be had to the lands mortgaged, and that the obligors would only be answerable for the deficiency. *Held*, that the mortgagee could maintain an action upon the implied covenant in defendant's deed, without first fore-

closing the mortgage, and could recover the whole amount unpaid.

*Id.*

4. Where a deed is introduced in evidence by one who is a stranger thereto, to prove as against a subsequent grantee an admission by the parties to the conveyance, the grantee is not estopped from proving that the provision relied upon was inserted in the deed by mistake. *Pope v. OHara.* ✓ 446

5. The use of the word appurtenances in a deed does not recognize or recreate an extinguished right of way across adjoining premises. *Id.*

See CLOUD ON TITLE, 1, 2, 3.  
CONSTRUCTIVE NOTICE, 2.  
CONTRACTS, 10.  
COVENANT, 2, 3.  
*Schott v. Schwartz* (Mem.), 666.

#### DEFENCES.

See DEEDS, 2  
EXECUTOR AND ADMINISTRATOR, 1.  
MISTAKE, 5, 6.  
SUPPLEMENTARY PROCEEDINGS, 2.  
*Schott v. Schwartz* (Mem.), 666.

#### DELIVERY

See CLOUD ON TITLE, 2, 3.  
SALES, 1, 2, 3.  
*Gibbs v. Van Buren* (Mem.), 661.

#### DEMAND.

See CONVERSION, 3.

#### DETERMINATION OF CLAIMS TO REAL PROPERTY.

1. An action to compel the determination of claims to real property is within the jurisdiction of the Supreme Court, and in such action it is its duty to determine the ques-

tions as to whether the plaintiff is entitled to the relief sought, and whether the relief should be sought in an action, or in proceedings under the Revised Statutes. An error in deciding these questions does not affect the question of jurisdiction, and the decision of the court thereon cannot be re-reviewed collaterally. *Fisher v. Hepburn.* 41

2. A party seeking to compel the determination of claims to real property has the choice of remedies; by action under section 449 of the Code, or by special proceedings under the Revised Statutes. (2 R. S., 818, as amended by subsequent acts.) *Id.*

3. Where an action is commenced, a defendant, by appearing and taking part in the proceedings to judgment without objection, will be held to have waived any objections to the regularity of the proceedings, and cannot thereafter object that the proceedings should have conformed to the provisions of the Revised Statutes as amended. *Id.*

4. When there are different claimants, each claiming distinct parcels of the real property in question, but all denying plaintiff's rights upon the same ground, and claiming title from the same source, it is proper to join them as defendants in the same action or proceedings. *Id.*

5. The caption to the findings of the justice, before whom an action to determine the title to real property was tried, was as follows: "At a Special Term of the Supreme Court for motions and chambers business, held at the chambers, at the City Hall, in the city of New York." It was objected, that the cause was not tried at any term of court, but before a judge out of court. This objection was not taken below. *Held*, 1st. That such an objection would not be permitted to be raised in this court for the first time. 2d. That it sufficiently appeared that the cause was tried at a Special Term, held at the place for holding courts in the city of New York, and it would not be

assumed that it was not a regular court for the hearing of all Special Term business, in the face of the fact that the parties, without objection, went to trial. *Id.*

6. Whether the proceedings to determine the title to real property are by action or special proceedings, the court has jurisdiction over the question of extra allowance of costs, and the decision cannot be set aside upon motion. *Id.*

### DEVISE.

See WILLS, 2.

*Magaw v. Field* (Mem.), 668.

### DISCONTINUANCE.

See TRUSTS AND TRUSTEES, 1.

### EASEMENT.

1. S., being the owner of a block of stores numbered 1, 2, 3 and 4, respectively, constructed a railway transversely through the cellars of Nos. 1, 2 and 3 for the benefit of No. 4. He sold and conveyed to different purchasers Nos. 1, 2 and 3, reserving in the deed the railway and the right to himself and assigns to pass and re-pass at pleasure. Subsequently the owners of Nos. 1, 2 and 3, being desirous of extinguishing the right of way and closing up the openings for the railway, purchased No. 4. In the deed thereof S. relinquished to the grantees all his right and title to the railway, and thereupon the owner of No. 3 built a solid stone wall between it and No. 3, without objection from the owner of the latter. The owner of No. 3, having subsequently become sole owner of No. 4, claimed the right of way, upon the ground that the agreement to extinguish it was by parol and therefore void. *Held*, that the right of way, having been created by deed, was not extinguished by non-user, and that it was a freehold interest, but that

the parol agreement, having been partially performed, was valid and operative as an equitable estoppel to extinguish the right of way. *Pope v. O'Hara.* ✓ 446

2. The use of the word appurtenances in a deed does not recognize or recreate an extinguished right of way across adjoining premises. ✓ *Id.*
3. A fire having occurred which destroyed the wall between Nos. 2 and 3, plaintiff, the owner of No. 2, and defendant, the owner of No. 3, entered into a contract by which plaintiff agreed to build a wall upon the same foundation, defendant to pay one-half the expense. Plaintiff built up a solid wall as before. *Held* (Lott, Ch. C.), that the writing controlled and estopped defendant from questioning acts done under it, and, therefore, from claiming a right of way. *Id.*

### ELECTION OF REMEDIES.

1. A party seeking to compel the determination of claims to real property has the choice of remedies; by action under section 449 of the Code, or by special proceedings under the Revised Statutes. (2 R. S., 313, as amended by subsequent acts.) *Fisher v. Hepburn.* 41
2. The remedy by an action, for rents, by one tenant in common against another, is cumulative, and does not bar the equitable adjustment of them on a partition in equity. *Scott v. Guernsey.* 106

### EMINENT DOMAIN.

See STATUTES, 5.

### EQUITY.

1. A party coming into a court of equity, and asking relief upon the ground of mistake, must show that he has used due diligence and good faith to avoid the consequences of the mistake. He cannot obtain re-

lief, where his delay and omission of duty has caused irreparable mischief to the other party. *Thomas v. Barton*. 193

2. Where there is a mistake, whether of law or of fact, in reducing an agreement to form or in carrying it into effect, equity will grant relief; but where the parties adopt the security which is to be used to effecuate their intention, if the security should fail, from ignorance of the law or from any other cause, to operate as the parties intended, the courts cannot substitute any other security for the one adopted. *Lanning v. Carpenter*. 408

See CONTRACTS, 13, 14.  
MISTAKE 5, 6.

#### ENLISTMENT,

See OFFICE AND OFFICER, 1, 2, 3, 4.

#### ESTOPPEL.

1. W. C. S. and M. B. S. were each the owner of premises formerly united, which were subject to a mortgage, of which, upon partition, each had assumed and agreed to pay the one-half. W. C. S. paid his portion; M. B. S. conveyed to R., subject to one-half the mortgage, which R. assumed. R. was ignorant of the fact that W. C. S. had paid more than his proportion of the payments already made, and understood and believed he was assuming but the one-half remaining unpaid, and he was allowed but that deduction from the purchase-price. W. C. S., who was to receive a benefit from the sale, was present at the execution of the conveyance, knew R. was taking it with such understanding and belief, and did not inform him of the real facts. In an action brought to foreclose the mortgage,—*Held*, that the rights and equities of the parties interested in the equity of redemption could properly be litigated and adjusted as between

themselves; that W. C. S. was estopped from claiming the exclusive benefits of the payments made by him before R.'s purchase, and that the balance due at the date of the purchase was chargeable equally upon the two parcels of land. *Erie Co. Savings Bank v. Roop*. 292

2. Where a deed is introduced in evidence by one who is a stranger thereto, to prove as against a subsequent grantee an admission by the parties to the conveyance, the grantee is not estopped from proving that the provision relied upon was inserted in the deed by mistake. *Pope v. O'Hara*. 446

See EASEMENT, 1, 3.  
JUDGMENT, 6.  
TELEGRAPH COMPANIES, 3.  
*Hadden v. Dimick* (Mem.), 661.

#### EVIDENCE.

1. An entry was made upon the journal of a bank in the regular day's business, charging certain mortgages held by the bank to the president and principal stockholder, who was the mortgagor, against a credit to him of a larger amount appearing upon the books of the bank. The book-keeper, who made the entry, had no recollection of the transaction. The mortgages were subsequently transferred by the bank to a *bona fide* purchaser for their face, the president and the bank representing them to be wholly unsatisfied and valid liens. In an action by a subsequent incumbrancer to remove the liens of the mortgages,—*Held*, that the entry alone, without some evidence of its adoption by the mortgagor and the bank, was not sufficient proof of the payment of the mortgages; and the subsequent action of both, in negotiating the mortgages, rebutted any inference of acquiescence or adoption. (Lott, Ch. C., dissenting.) *Whitehouse v. Bank of Cooperstown*. 239
2. Where, in an action upon a written instrument, the issue is as to the genuineness of the signature

- thereto, other papers executed by defendant, the signatures to which are conceded to be genuine, but which are not properly in evidence for other purposes, cannot be received in evidence or submitted to the jury to enable them to compare the signatures, and thus draw a conclusion as to the genuineness of the one in question. *Randolph v. Loughlin*. 456
3. When the receipt given by an express company, upon receiving a package for transportation which contains the contract, is lost, but a sworn copy thereof is produced, an entry of the transaction made in the books of the company by the clerk receiving the package is not competent evidence for the purpose of showing what the contract was, nor is evidence of the custom of the company to make a special entry in cases of contracts of the nature of the one claimed, and that in the case at bar there was no such entry. (GRAY and LEONARD, CC., dissenting.) *Reed v. U. S. Express Co.* 462
  4. Where the preliminary proof of loss and of comparison has been given to make a copy of a contract evidence, the copy is legally of as high an order of proof as would have been the original, and parol proof cannot be given to weaken or alter the contract thus established. (GRAY and LEONARD, CC., dissenting.) *Id.*
  5. A certificate of deposit issued by a bank is not a contract, but an evidence of debt; it is in the nature of a receipt, and parol evidence is admissible to explain it, the same as in case of a receipt. *Hotchkiss v. Mosher*. 478
  6. Plaintiff, as a witness for himself, was asked to state what notes he had guaranteed. He answered from a written memorandum furnished him by defendants. *Held*, that the question was proper, as it simply called for a description merely, not the contents of the notes, and that the memorandum, as an admission of defendants, was proper evidence. *Id.*
  7. M., one of the defendants, as a witness for them, was asked to state whether, if the notes had been left for collection, they would have been placed to collection account; also, whether, if the money had been paid to the bank for the notes, he would have given a certificate of deposit. *Held*, that the question was purely hypothetical, and the evidence was properly excluded. *Id.*
  8. Where, in an action of trespass, defendant claims title to the *locus in quo* by adverse possession, the declarations of a former occupant under whom defendant claims are admissible as evidence, to characterize his possession as adverse to any title of the plaintiff; and this is competent under a general plea of title, without allegations that title is claimed by adverse possession. *Mores v. Salisbury*. 686
- See CHATTEL MORTGAGE, 2.  
 CONTRACTS, 23, 24.  
 DEED, 4.  
 FORMER ADJUDICATION, 2.  
 PLEADINGS, 2, 6.  
 SHIPPING, 7.  
 STATUTES, 7.  
 STEAMBOATS, 2.  
 TRIAL, 1.  
 TRUSTS AND TRUSTEES, 1.  
*Green v. Plank* (Mem.), 669.  
*Baldwin v. Bald* (Mem.), 673.  
*Krom v. Levy* (Mem.), 679.  
*Waugh v. Fielding* (Mem.), 681.
- EXECUTION.
- While personal property covered by a mortgage remains in the possession of the mortgagor and its conditions are unbroken, the mortgagor's interest is subject to levy and sale upon execution, and the purchaser obtains the same title as that of which the mortgagor was possessed. This interest he can lawfully sell, and no claim arises against him in favor of the mortgagor, from the fact that he attempts to sell or does sell a clear title. There is no wrong done the mortgagor thereby, as he may still pursue his lien under the mortgage and his rights remain the same.

In an action, therefore, by the mortgagor against the purchaser, it is not error to exclude evidence of such a sale. *Hamill v. Gillespie*. 558

See CONVERSION, 2.  
DAMAGES, 1, 2.  
EXEMPT PROPERTY.  
SHERIFF 2.

### EXECUTOR AND ADMINISTRATOR.

1. It is the duty of executors and administrators to receive the rents and profits of premises leased to their testator or intestate, accruing after his death, and to the extent of the rent reserved in the lease, to apply them in payment thereof, instead of placing them among the general assets; and they are personally liable for the rent, to the extent of the rents and profits received by them. *Prima facie*, these are sufficient to pay the whole rent; if not, it is matter of defence. *Miller v. Knox*. 232
2. A landlord may collect the rents, accruing after the death of his tenant, of the estate of the deceased, or of the executors or administrators personally, to the extent of the rents and profits of the premises received by them, and the balance, if any, of the estate. *Id.*
3. Where a certain sum is bequeathed to executors in trust, to pay the interest thereof at a fixed and stated rate to one, and upon his death to divide the principal among others, the executors cannot, without the consent of the *cestuis que trust*, or, in case they are infants, without an order of the court, set apart and appropriate bank stocks to the satisfaction of the trust, and release the residue of the estate from its liability to perform the trust. *Leitch v. Wells*. 585
4. The *cestuis que trust* may assent to and accept such an appropriation; but if, before this is done, new interests and new parties

have intervened, the situation of the property at the time of such intervention must determine the rights of all who claim to be interested in it. *Id.*

5. An executor has a right to sell and transfer stocks and other securities of the estate, and one who buys in good faith, paying in money the price agreed upon, or who loans money upon security of the property, is not responsible for the application of the purchase-money or money loaned, and his right to the property transferred is not affected by knowledge upon his part, of the existence of a claim for a legacy or a debt against the estate generally. *Id.*

See PARTIES, 2.  
TRIAL, 3.

### EXEMPT PROPERTY.

- A judgment recovered by a debtor against his creditor for an unlawful levy upon, and sale of exempt property, cannot be reached by the creditor through proceedings supplementary to execution. Such judgment represents the property for the value of which it was recovered. The proceeds of the judgment will be protected as exempt property until sufficient time has elapsed to afford the debtor a reasonable opportunity to again purchase the exempt property. *Tillotson v. Wolcott*. 188

### EXPRESS COMPANIES.

1. Where an express company agrees to forward a package to a point beyond the terminus of its route, the contract expressly limiting its liability to that of forwarders, and through charges not having been paid, the liability of the company as a common carrier ceases at the end of its route, and if the package arrives there in safety and is delivered with proper instructions to another responsible carrier upon the line to the point of destination,

its liability ceases. The equivalent of the words "to forward" is "to send;" not "to carry." (HUNT, C., and LOTT, Ch. C., dissenting.) *Reed v. U. S. Express Co.* 463

2. When the receipts given by an express company and containing the contract is lost, but a sworn copy thereof is produced, an entry of the transaction made in the books of the company by the clerk receiving the package is not competent evidence for the purpose of showing what the contract was, nor is evidence of the custom of the company to make a special entry in cases of contracts of the nature of the one claimed, and that in the case at bar there was no such entry. (GRAY and LEONARD, CC., dissenting.) *Id.*

3. Where the preliminary proof of loss and of comparison has been given to make a copy of a contract evidence, the copy is legally of as high an order of proof as would have been the original, and parol proof cannot be given to weaken or alter the contract thus established. (GRAY and LEONARD, CC., dissenting.) *Id.*

#### FINDINGS OF LAW AND FACT.

1. Plaintiff paid to defendants, who were bankers, the amount of certain notes held by them, which were guaranteed by him, for the purpose of taking up the same; the notes, being made payable at defendants' bank, were left with them for collection. As a voucher of the transaction, defendants delivered to plaintiff a certificate of deposit for the amount paid for the notes. In an action of trover for the conversion of the notes,—*Held*, that the referee was justified in finding that the certificate was a voucher that plaintiff had paid the money for the notes, thus giving it the character and effect ascribed to it by defendants. He was also justified in refusing to find that the money paid was a deposit. *Hotchkiss v. Mosher.* 478

2. When the facts which constitute a transaction are stated in detail in a referee's report, his finding as to their effect is a conclusion of law. *Id.*

#### FIXTURES.

1. There are several tests which aid in determining the question whether articles, personal in their nature, have acquired the character of real estate. 1st. Actual annexation, which must be of a permanent character, except in case of those articles which are not themselves annexed, but are deemed to be of the freehold from their use and character. 2d. Adaptability to the use of the freehold. 3d. The intention of the parties at the time of making the annexation. In the case of machinery, the circumstance that it may or may not be removed from the freehold, without great injury to the building containing it or to itself, is not now deemed to be controlling. *Voorhees v. McGinnis.* 278

2. One K., being the owner of a saw and grist-mill, for the purpose of supplying steam power to both, in 1850 erected a substantial building, adapted for the purpose, to contain the requisite machinery; he placed therein a steam-engine, boilers, shafting, gearing, etc.; the engine and boilers were placed upon and bolted to solid brick foundations resting upon the ground excavated for the purpose; the brick-work being carried up and over the boilers; the shafting and gearing were constructed with especial reference to the place; were adapted to the nature and objects of their employment, and were firmly fastened and bolted to the building, but could be removed without injury to its walls. They were put up without special intent, on the part of K., either of making them part of the freehold or of removing them at a future time. K. borrowed the money to make the improvements, giving a mortgage upon the property. In 1860 the old boilers were taken out and replaced by new ones; while the new boilers were

at the shop in process of construction, and a large portion of the engine there being repaired, K. gave a chattel mortgage upon them to defendant W., and after the repairs were completed and the machinery in running order, gave another upon them and the other machinery to defendant McG. After the repairs and before the last chattel mortgage he gave another real estate mortgage upon the premises; plaintiff acquired title upon foreclosure and sale under the two real estate mortgages. Defendants subsequently removed the machinery covered by their mortgages. In an action to recover possession,—*Held* (GRAY, C., dissenting), that although K. had no special intent, the facts disclosed that the boilers, engine, shafting and gearing were intended to be a permanent accession to the freehold; that the execution of the first chattel mortgage was not sufficient to overthrow this presumption and raise the contrary one, of an intent to preserve their personal character; that therefore they became and were a part of the freehold, and passed to the plaintiff upon his purchase. The remedy of the mortgagees is against those who wrongfully converted the personal into real property. *Id.*

#### FORECLOSURE

W. C. S. and M. B. S. were each the owner of premises formerly united, which were subject to a mortgage, of which, upon partition, each had assumed and agreed to pay the one-half. W. C. S. paid his portion; M. B. S. conveyed to R., subject to one-half the mortgage, which R. assumed. R. was ignorant of the fact that W. C. S. had paid more than his proportion of the payments already made, and understood and believed he was assuming but the one-half remaining unpaid, and he was allowed but that deduction from the purchase-price. W. C. S., who was to receive a benefit from the sale, was present at the execution of the conveyance, knew R. was taking it with such understanding and belief, and did not inform him of the

real facts. In an action brought to foreclose the mortgage,—*Held*, that the rights and equities of the parties interested in the equity of redemption could properly be litigated and adjusted as between themselves; that W. C. S. was estopped from claiming the exclusive benefits of the payments made by him before R.'s purchase, and that the balance due at the date of the purchase was chargeable equally upon the two parcels of land. *Erie Co. Savings Bank v. Roop.* 292

*See Bush v. Rochester City Bank* (Mem.), 659.  
*Stackpole v. Robbins* (Mem.), 665.

#### FORGERY.

*See EVIDENCE, 2.*

#### FORMER ADJUDICATION.

1. An insolvent partnership made an assignment of its property and effects for the benefit of creditors. One of the creditors brought an action in his own behalf, and that of others who should come in and claim the benefit thereof, against the assignees, for an accounting and distribution of the trust fund, in which action an order was entered appointing a referee to take and state the account of the assignees, and to report the amount due such creditors as should come in under the order and seek the benefit of the action, and directing the publication of notices to the creditors to come in and exhibit their demands, which order was complied with, and upon the coming in and confirmation of the report of the referee an order was made for the distribution of the fund, which was fully executed by the assignees. *Held*, that in the absence of fraud, all the creditors of the assignor were bound by the decree, whether they came in and proved their claims or not, and that a creditor who failed to do this was barred, although he had no notice of the action, and knew



nothing of it until after the distribution of the trust fund; also *held*, that it was not the duty of the assignees, having knowledge of the claim of a creditor who did not appear, to produce and prove such claim before the referee. *Kerr v. Blodgett*. 63

2. A judgment by default in an action to recover a payment of interest due upon a promissory note, where process was personally served and defendant appeared, but did not answer, is conclusive evidence against a defence of usury interposed in an action between the same parties, brought to recover the principal of said note. (Lott, Ch. C., dissenting.) *Newton v. Hook*. 675

See *Taylor v. Spader* (Mem.), 664.  
*Stackpole v. Robbins* (Mem.), 665.

## FRAUD.

See FRAUDULENT CONVEYANCES.  
PARTNERSHIP, 3, 4.  
PRINCIPAL AND AGENT, 1.  
*Terry v. Wail* (Mem.), 657.

## FRAUDULENT CONVEYANCES.

The sale of the entire effects of an insolvent copartnership upon credit, at a fair valuation, to a responsible vendee having knowledge of the insolvency, is not *per se* fraudulent. Although made by the vendor with intent to hinder, delay and defraud creditors, that does not affect the title of the purchaser, unless he had previous notice of the fraudulent intent. *Ruhl v. Phillips*. 125

## GENERAL TERM.

See APPEAL, 4.

## GRANTOR AND GRANTEE.

See COVENANTS, 2.  
DEEDS.

## HIGHWAYS.

The last clause of section 1 of the "Act to amend the Revised Statutes in respect to highways" (Laws of 1861, chap. 811), which provides that all highways that have ceased to be traveled or used as such for six years shall cease to be highways for any purpose, is not limited by the second section of said act to highways "laid out and dedicated," but applies as well to highways created by twenty years' user. Said clause, however, is not retroactive in its effect, but only applies to such highways as have ceased to be traveled or used for six years after the passage of the act. (LEONARD, C., dissenting.) *Amsbry v. Hinds*. 57

## IMPLIED COVENANTS.

See CHATTEL MORTGAGE, 1.  
CONTRACTS, 2.  
COVENANTS, 1.  
DEEDS, 3.

## INJUNCTION.

1. It is ministerial, not judicial officers, whom the court has power to restrain when proceeding illegally under a claim of right. The process of injunction, in a proper case for staying a judgment, goes against the parties, not the tribunal or its judges. *W. R. R. Co. v. Nolan*. 513
2. The rule denying the right to interfere by injunction to restrain the collection of a tax, is one of public policy, and it is equally applicable to the case of an assessment. *Id.*

## INSOLVENCY.

A petitioning creditor under the two-thirds act, who adds to his signature the declaration of release required by said act (2 R. S., 36, § 11), thereby only transfers to the assignee any and every lien or security upon the estate and pro-

perty of the debtor, not a lien or security upon the property of a third person. When, therefore, such creditor has a joint judgment against two, the signing of the petition of one does not transfer to the assignee his claim against or lien upon the property of the other. *Elsworth v. Caldwell*. 680

### INSURANCE (FIRE).

Defendant issued to plaintiff a policy of insurance, covering his stock of goods on the first floor of the building, No. 39 Centre street, N. Y. Prior to the expiration of the policy, plaintiff removed the goods and business to an upper story in the same building. Defendant, with full notice of the change of location, received the premium for renewal, and issued a renewal receipt referring to 39 Centre street, and to the former policy, but expressing in itself no restriction to the first floor. The property being destroyed by fire, in an action to recover the amount insured,—*Held*, that it must be presumed the company intended to give a valid insurance, as to presume the contrary would be to impute a fraudulent intent; it also intended plaintiff to understand he had received such an insurance. The contract of reinsurance, therefore, will be construed as covering the goods in the new location, and in this respect modifying the original contract. *Ludwig v. Jersey City Ins. Co.* 379

*See Sands, Rec'r, v. Graves* (Mem.), 653.

### INSURANCE (LIFE).

1. A provision in a policy of life insurance, forfeiting the policy in case the assured shall enter into any military or naval service without the consent of the company, includes only such service as will require the person entering into it to do duty as a combatant. An employment, therefore, by military authorities, in constructing a rail-

road bridge, is not within the prohibitions of the policy, and does not invalidate it. *Wells v. Conn. Mut. Life Ins. Co.* 84

2. At the time of issuing the policy in question, defendant for a further premium of fifty dollars, by a written instrument, gave the assured permission to go south of the thirty-sixth degree of north latitude and reside there during the time of one year; provided, and with the understanding and agreement, that the policy did not insure against death from any of the casualties or consequences of war or rebellion, or from belligerent forces. While engaged in building a railroad bridge, under the direction of the military authorities of the United States, about thirty miles in the rear of the Union army, and still further from the Confederate forces, the assured was shot and killed by two of a party of men not in uniform, who robbed the men employed upon the work and residents near. *Held*, that the language of the proviso included only death from casualties or consequences of war or rebellion carried on or waged by authority of some *de facto* government; that this case did not come within that limit, and that defendant was liable. *Id.*

### INSURANCE (MARINE).

1. An insurance for a single premium upon a vessel, at and from the port where she is lying to another, is a continuous and indivisible risk; and a voluntary and unnecessary departure from port, except upon the voyage insured, avoids the policy and discharges the underwriter from all liability under it. *Fernandez v. G. W. Ins. Co.* 571
2. Defendant insured plaintiff's vessel then lying in port at New York, undergoing repairs, "at and from New York to Havana." After the repairs were completed the vessel went on a trip to Elizabethport, N. J. (sixteen miles

distant from New York), to test her engines and take in coal. She returned to New York and subsequently sailed for Havana, and while prosecuting her voyage was destroyed by fire.—*Held*, that the voyage to Elizabethport was in violation of the terms and conditions of the policy, and defendant was not liable thereon. *Id.*

3. Warranties in a policy of insurance must be strictly and perfectly complied with; this strict compliance, however, operates in favor of as well as against the assured when he brings himself within the terms thereof. *Snow v. Col. Ins. Co.* 624

4. A warranty in a policy of marine insurance not to use a certain port means not to go into it. Going near or in the direction of the prohibited port is not a breach of the warranty, and this is so although the vessel was approaching with intent to enter the port. The fact and not the intent, gives the legal character to the transaction. Where, therefore, a vessel, covered by a policy containing such a warranty, while sailing toward the prohibited port with intent to enter it, is lost before reaching it, there is no breach of the warranty and the underwriters are liable. *Id.*

## INTERPLEADER.

*See* BAILMENT, 2.

## JOINT PLAINTIFFS.

*See* PARTIES, 8.

## JUDGMENTS.

1. A judgment in an action, where the court rendering it has jurisdiction of the parties and the subject-matter, is final, until, in some of the modes of review known to the law, it has been reversed; the decision of the court ordering the judgment cannot be reviewed upon

motion to set it aside. *Fisher v. Hepburn.* 41

2. A party who has appeared and litigated the action cannot move to set aside the judgment, upon the ground that such an action cannot be maintained. If he made no objection to the sufficiency of the complaint, and litigated the cause upon the merits, he would be bound by the judgment. If he raised the objection, it would be the duty of the court to decide it, and if the court erred, the only mode of review known to the law is by appeal from the judgment or a motion for a new trial upon a case or bill of exceptions. *Id.*

3. A judgment creditor has a mere general, not a specific lien upon the debtor's real estate; he cannot therefore maintain an action for waste committed thereon. *Lanning v. Carpenter.* 408

4. Parties cannot, by agreement, convert a judgment into a personal mortgage or a bill of sale, or give to it any greater effect than the law gives to it. A parol agreement, therefore, that a judgment shall be a lien upon all the debtor's personal property, will not be enforced in equity, even as against subsequent assignees who assented to the arrangement. (*EARL, C.*) *Id.*

5. It was agreed between a debtor and his creditors that he should give the latter security for their respective claims by confessing judgment, the judgment in favor of one creditor to be first entered and to have priority of lien upon all the property, real and personal, of the debtor. The judgments were entered in Schuyler county, as agreed, all parties supposing that county to be legally organized. It was subsequently decided that Schuyler county was not constitutionally organized, and that the judgment should have been docketed in Steuben. In an action brought by the preferred creditor to establish his equitable lien,—*Held*, that, as between the parties, the plaintiff was entitled to the same position that he would have occupied had his judgment been

- docketed in the proper county; but he was not entitled to a lien upon timber cut upon the debtor's real estate after the docketing of the judgment, and transferred by the latter to the other creditors to be applied upon their judgments before the issuing of execution upon plaintiff's judgment. Also *held* (EARL, C.), that plaintiff had no lien upon the debtor's personal property which had been so transferred prior to the issuing of his execution. *Id.*
6. Where, in an action in the nature of a creditor's bill, brought to set aside a conveyance by the judgment debtor, as fraudulent, the plaintiff obtains a verdict and judgment is perfected some months thereafter, the adjudication, so far as relates to the validity of the judgment upon which the creditor's bill was founded, dates from the time the verdict was rendered, and the judgment simply estops the parties from denying that at that time the original judgment was a valid and subsisting one; it is not conclusive that the original judgment was unpaid at the time the judgment in the creditor's suit was perfected. *Fitzgerald v. Topping.* 488
7. Where in an action brought by two plaintiffs, they fail to establish a joint interest, but a separate cause of action in favor of one of the plaintiffs is established, the court has power, under § 274 of the Code, to give judgment in favor of the one and against the other, but it is not bound so to do, and a judgment against both is not erroneous. *Callins v. Smith.* 614
- See Babcock v. Hermance* (Mem.), 683.
- ings under the Revised Statutes. An error in deciding these questions does not affect the question of jurisdiction, and the decision of the court thereon cannot be reviewed collaterally. *Fisher v. Hopburn.* 41
2. Whether the proceedings to determine the title to real property are by action or special proceedings, the court has jurisdiction over the question of extra allowance of costs, and the decision cannot be set aside upon motion. *Id.*
3. The Superior Court of the city of Buffalo has jurisdiction of an action against the board of supervisors of Erie county, where the summons is served upon the chairman or clerk of the board in that city. *The B. & S. L. R. R. Co. v. Supervisors* 93
4. The County Court has jurisdiction to order a receiver appointed by it, in proceedings supplementary to execution, to release to the debtor a judgment recovered by him for an unlawful seizure and sale of exempt property. *Tolson v. Wolcott.* 188

## JUSTICES' COURT.

*See Costs*, 1.

## LACHES.

- A party coming into a court of equity and asking relief upon the ground of mistake, must show that he has used due diligence and good faith to avoid the consequences of the mistake. He cannot obtain relief where his delay and omission of duty has caused irreparable mischief to the other party. *Thomas v. Bartow.* 193

## JURISDICTION.

1. An action to compel the determination of claims to real property is within the jurisdiction of the Supreme Court, and in such action it is its duty to determine the questions as to whether the plaintiff is entitled to the relief sought, and whether the relief should be sought in an action or in proceed-

## LANDLORD AND TENANT.

*See LEASE.*

LEASE.

1. It is the duty of executors and administrators to receive the rents and profits of premises leased to their testator or intestate, accruing after his death, and, to the extent of the rent reserved in the lease, to apply them in payment thereof, instead of placing them among the general assets; and they are personally liable for the rent, to the extent of the rents and profits received by them. *Prima facie*, these are sufficient to pay the whole rent; if not, it is a matter of defence. *Miller v. Knox*. 283
2. A landlord may collect the rents, accruing after the death of his tenant, of the estate of the deceased, or of the executors or administrators personally, to the extent of the rents and profits of the premises received by them, and the balance, if any, of the estate. *Id.*
3. A covenant in a lease, whereby the lessee agrees to bear, pay and discharge all taxes and assessments which shall be imposed upon the demised premises during the term, is broken when the lessee neglects to pay a tax or assessment duly imposed. It is not simply a contract of indemnity, but by it the tax or assessment, as between the parties, becomes the debt of the lessee. The lessor, therefore, can maintain an action thereon without first paying the tax or assessment, and as damages he is entitled to recover the amount of such tax or assessment. *Rector, etc., of Trinity Church v. Higgins*. 532
4. Parties have the right to make a contract contravening the rule that actual compensation will only be given for actual loss, and when the intent so to do is expressed in apt and suitable language, courts of justice will enforce it. *Id.*
5. The fact that neither the particular tax or assessment, nor the time of payment, nor the person or corporation to whom payable, are stated in the covenant, does not make it one for indemnity merely.

That is certain which is capable of being rendered certain. *Id.*

6. Nor is it an objection that there is a risk attendant upon the payment of the judgment without prepayment of the tax or assessment. The lessee can make payment even after judgment, and upon application to the court after such payment the collection of the judgment, except as to costs, will be stayed, and, upon payment of costs, satisfaction will be ordered. *Id.*

*See Pike v. Walter (Mem.)*, 681.

LIBEL.

1. In construing a publication alleged to be libelous, the scope and object of the whole article is to be considered, and such a construction put upon its language as would naturally be given to it. The test is, whether in the mind of an intelligent man the terms of the article and the language used import a criminal or disgraceful charge. *More v. Bennett*. 472
2. Extrinsic averments are not necessary where the words used, giving them their natural construction, tend to injure the reputation of the subject, and expose him to hatred, contempt or ridicule. *Id.*
3. The complaint in this action charged, in substance, that defendant published an article wherein the writer, after stating that a certain woman was a prostitute, alleged that, as he understood, she was under the patronage or protection of the plaintiff. The complaint alleged that this charge was false and malicious, and tended to blacken and injure plaintiff's reputation, and expose him to public contempt. Plaintiff was nonsuited upon the ground that the complaint did not state a cause of action, as it contained no averment that the publication intended to charge that the prostitute was under plaintiff's protection for illicit purposes. *Held*, error; that the

intent to charge a criminal patronage or protection was manifest in the publication. The complaint was sufficient, therefore, without such averments. *Id.*

### LIEN.

1. Sections 292 and 294 of the Code furnish a substitute for the creditor's bill, as formerly used. The service of the order, under those sections, takes the place of the commencement of a suit under the old system, and gives the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of the debtor. *Lynch v. Johnson.* 27

2. A final order of a judge, in proceedings under section 294, requiring the debtor of a defendant to pay his debt to the plaintiff, renders this lien effectual; and payment, or liability to pay, in pursuance of such order, is a defence to the debtor in an action against him by his creditor, or by an assignee who is not shown to be a *bona fide* purchaser for value of the claim, prior to the accruing of the lien. *Id.*

3. A judgment creditor has a mere general, not a specific lien upon the debtor's real estate. He cannot, therefore, maintain an action for waste committed thereon. *Lanning v. Carpenter.* 408

4. Parties cannot, by agreement, convert a judgment into a personal mortgage or a bill of sale, or give to it any greater effect than the law gives to it. A parol agreement, therefore, that a judgment shall be a lien upon all the debtor's personal property, will not be enforced in equity, even as against subsequent assignees who assented to the arrangement (*EARL, C.*) *Id.*

See CONSTRUCTIVE NOTICE, 2, 3.  
PARTITION 8.

### LIMITATION OF ACTIONS.

1. The inclination of the courts is not to go beyond the strict letter

of the statute, in presuming from mere lapse of time an extinguishment of a sealed obligation to pay. (*GRAY, C.*) *Central Bank v. Heydorn.* 260

2. As under the provisions of the "Act to provide for the incorporation of companies to construct plank-roads," etc. (chap. 210, Laws of 1847), in order to enforce the personal liability given by said act (§ 44) against stockholders, provision is made that a joint action may be prosecuted against the company and any one or more stockholders liable to contribute to the payment of its debts; the moment a cause of action accrues against the company it accrues against each stockholder liable, and as to them the statute of limitations begins to run. If therefore an action against a stockholder is not commenced within the period prescribed by the statute of limitations, it is barred. (*EARL, C., dissenting.*) *Conklin v. Furman.* 537

### LIS PENDENS.

See NOTICE OF SUITS PENDING.

### LOAN COMMISSIONERS.

See *Stackpole v. Robbins* (Mem.), 665

### MARRIED WOMEN.

1. Under the provisions of the act of 1860, concerning the rights and liabilities of husband and wife (Laws of 1860, chap. 40), as amended in 1862 (Laws of 1862, chap. 172), the paraphernalia of a wife, given her by her husband, which prior to those statutes was her separate estate in equity, became clothed with all the incidents of a legal estate; and, for an injury to or conversion thereof, she is the proper person to bring suit. *Rawson v. Pa. R.R. Co.* 212

2. As coverture does not prevent the acquisition of property by a married woman, the fact of coverture does not affect the title to stock transferred by her; and where the stock stands in her name the certificate is evidence of its absolute ownership by her; and in case there is nothing in it or connected with it indicating a trust in favor of another person, one loaning money upon pledge of the stock as security is warranted in making the loan upon the assumption of such ownership; he is not bound to inquire and ascertain how she obtained it. *Leitch v. Wells*. 585

See *Schott v. Schwartz* (Mem.), 666.

## MILITARY SERVICE.

See INSURANCE, LIFE.

## MISTAKE.

1. Plaintiff purchased and paid for certain real estate, directing the vendor to execute to her a deed conveying the same to her, with a proviso therein that if her son should pay her \$200 per year during her life, he should have the property after her death. By mistake, the deed was so drawn as to grant the land to her in trust for her son, upon certain conditions, not being a trust recognized by the statute of uses and trusts. Plaintiff received the deed without examination, and did not discover the mistake for several months thereafter. When she did discover it, with the concurrence of her son, who refused to take under the deed, she returned it to her grantor, when the same was destroyed, and a new deed was executed and delivered to her, conveying the premises in fee; subsequently the premises were levied upon, advertised and sold, under an execution against the son. The purchaser at the sheriff's sale claimed that the son had the title to the premises or an interest therein, which he had purchased, and this he

threatened to enforce. *Held*, that there was not a valid and effectual delivery and acceptance of the first deed, so as to pass the title; that the son had no interest in the premises, and that an action to quiet the title could be maintained. *Fonda v. Sage*. 178

2. Even if there was such a delivery; the mistake could not be corrected without the aid of the court, the plaintiff remained the equitable owner, with rights superior to the purchaser at the sheriff's sale; and with all the necessary parties before it, the court could, in an action brought to quiet the title, establish plaintiff's title under the second deed, and annul any claim of title under the first. *Id.*

3. Where there is a mistake, whether of law or of fact, in reducing an agreement to form or in carrying it into effect, equity will grant relief; but where the parties adopt the security which is to be used to effectuate their intention, if the security should fail, from ignorance of the law, or from any other cause, to operate as the parties intended, the courts cannot substitute any other security for the one adopted. *Lanning v. Carpenter*. 408

4. It was agreed between a debtor and his creditors that he should give the latter security for their respective claims by confessing judgment, the judgment in favor of one creditor to be first entered and to have priority of lien upon all the property, real and personal, of the debtor. The judgments were entered in Schuyler county, as agreed, all parties supposing that county to be legally organized. It was subsequently decided that Schuyler county was not constitutionally organized, and that the judgment should have been docketed in Steuben. In an action brought by the preferred creditor to establish his equitable lien,—*Held*, that, as between the parties, the plaintiff was entitled to the same position that he would have occupied had his judgment been docketed in the proper county; but he was not entitled to a lien

upon timber cut upon the debtor's real estate after the docketing of the judgment, and transferred by the latter to the other creditors to be applied upon their judgments before the issuing of execution upon plaintiff's judgment. Also *held* (EARL, C.), that plaintiff had no lien upon the debtor's personal property which had been so transferred prior to the issuing of his execution. *Id.*

5. Where parties, to carry out their contract, agree to use an instrument which, by their mistake of the law, will not effectuate their intention, equity will not reform the instrument or substitute another; but where parties intending to reduce a parol agreement to writing, and because they are ignorant of the force of language, and misunderstand the meaning of the terms used, make a contract different from that designed, equity will grant relief by reforming the instrument and compelling the parties to execute and perform their agreement as they made it. It matters not whether such a mistake be called one of law or of fact. *Fischer v. Hennessey.* 415

6. An equitable defence of this nature can be litigated upon a jury trial. *Id.*

*See* ESTOPPEL, 2.  
PLEADING, 2.

### MORTGAGE.

*See* FIXTURES, 2.  
FORECLOSURE.  
PAYMENT.  
*Bush v. Rochester City Bank* (Mem.), 659.  
*Stackpole v. Robbins.* (Mem.), 665.

### MOTIONS AND ORDERS.

1. A judgment in an action, where the court rendering it has jurisdiction of the parties and the subject-matter, is final, until, in some of the modes of review known to the law, it has been reversed; the de-

cision of the court ordering the judgment cannot be reviewed upon motion to set it aside. *Fisher v. Hepburn.* 41

2. A party who has appeared and litigated the action cannot move to set aside the judgment, upon the ground that such an action cannot be maintained. If he made no objection to the sufficiency of the complaint, and litigated the cause upon the merits, he would be bound by the judgment. If he raised the objection, it would be the duty of the court to decide it, and if the court erred, the only mode of review known to the law is by appeal from the judgment or a motion for a new trial upon a case or bill of exceptions. *Id.*

3. An action to compel the determination of claims to real property is within the jurisdiction of the Supreme Court, and in such action it is its duty to determine the questions as to whether the plaintiff is entitled to the relief sought, and whether the relief should be sought in an action, or in proceedings under the Revised Statutes. An error in deciding these questions does not affect the question of jurisdiction, and the decision of the court thereon cannot be reviewed collaterally. *Id.*

4. Whether the proceedings to determine the title to real property are by action or special proceeding, the court has jurisdiction over the question of extra allowance of costs, and the decision cannot be set aside upon motion. *Id.*

*See* APPEAL, 2, 5, 6, 7.

### MUNICIPAL CORPORATIONS.

*See* ASSESSMENT AND TAXATION, 13, 14, 15.

### NEW TRIAL.

No appeal lies to this court from an order denying a motion for a new trial on the ground of surprise or



newly discovered evidence. The question is one of discretion with the court below. *Donley v. Graham*. 658

See *APPEAL*, 4.

# NON-RESIDENTS.

See *ASSESSMENT AND TAXATION*, 12, 13, 14, 15.

# NOTICE.

In an action of trover for the conversion of a written obligation, the defendant is supposed to have it in his possession or under his control, and no notice to produce it upon the trial is necessary to enable plaintiff to give parol evidence as to its contents; the action itself is notice. *Hotchkiss v. Mosher*. 478

See *CONSTRUCTIVE NOTICE. CONTRACTS*, 4, 5.

# NOTICE OF SUIT PENDING.

1. The commencement of an action by the service of a summons does not create a *lis pendens* affecting third persons not parties to the action. To bind a purchaser *pendens lite* by the judgment, there must also be a bill or complaint on file at the time of his purchase, in which the claim upon the property is set forth. *Leitch v. Wells*. 585

2. The rule of *lis pendens* is a hard one, not a favorite of the courts, and a party claiming the benefit of it must clearly bring his case within it. In the absence of proof, therefore, it will not be presumed that the complaint was filed prior to the entry of judgment. *Id.*

3. Stocks are articles of commerce, passing from hand to hand like commercial paper, and the doctrine of constructive notice by *lis pendens* is not applicable to them. (*EARL, C.*) *Id.*

See *Jeffres v. Cochrane* (Mem.), 871.

# OFFICE AND OFFICER.

1. Where one furnishing men to fill the quotas of certain towns, under a call of the president, at the requirement of the provost marshal, deposited with him county bonds, under a parol agreement that they should be held as security, at the rate of \$550 per man, that the men then and thereafter to be furnished by him should not desert before reaching the place of rendezvous, — *Held*, that the agreement was void, under the statute of frauds, it being an agreement to answer for the default or miscarriage of another, and was not so far executed by the delivery of the securities as to give the officer an interest in or right to retain them. *Richardson v. Crandall*. 348

2. Under the act of congress of 1863 (12 U. S. Stat. at Large, 781), "for enrolling and calling out the national forces," etc., it was the duty of the provost marshal, when men were presented for enlistment, if he found them of suitable age and "not physically or morally unfit for service," to enlist and muster them in. He had no right to reject them because he thought they would desert, nor to require security against desertion; therefore, aside from the provisions of the statute of frauds, the pledge of such bonds was illegally exacted, and was void, as taken *colore officii*. *Id.*

3. If he had a discretion in receiving or rejecting the men presented, it was his duty to have exercised this discretion, under his oath of office, uninfluenced by the security which he exacted. In this view of the case, also, the pledge must be considered as against public policy, and taken *colore officii*. *Id.*

4. The statute of this State, as to securities taken *colore officii*, does not apply to officers of the United States, but the illegality of such a pledge is determined by the principles of public policy, as sanctioned by the common law. *Id.*

5. In order to condemn a security, as taken by a public officer *colore officii*, it is not necessary to show it was taken with an evil or corrupt intent. The officer may not legally exact a bond before he will perform a plain duty or when it tends to a lax performance of duty, although there be no actual corrupt motive. The law looks not to any particular contract to see that it is free from taint of actual fraud, oppression or corruption, but it looks to the general tendency of such contract, and it is condemned if it belongs to a class which the law will not tolerate. *Id.*
  6. The common-law prohibition is aimed at the public officer, not at the one yielding to his exactions; the parties are not upon an equal footing; and when the former receives securities or money, contrary to those prohibitions, the parties are not *in part delictu*. *Id.*
  7. The agreement in this case was also void, as without consideration. *Id.*
  8. The salary allowed to an officer of a corporation is presumed to be for services to be performed by him as such. Where, therefore, with the assent and co-operation of such officer, all the property, business and franchises of the corporation are sold, so that he has no further duty to perform, there is no basis in law or equity for a claim, upon his part, that the salary continues, and the contract, as to salary, will be deemed to be canceled, although the corporation itself is not dissolved. *L. I. Ferry Co. v. Terbell.* 427
- See ASSESSMENTS AND TAXATION, 18.  
INJUNCTION, 1.  
SHERIFFS.
- PARTIES.
1. Where there are different claimants, each claiming distinct parcels of the real property in question, but all denying plaintiff's rights upon the same ground, and claiming title from the same source, it is proper to join them as defendants in the same action or proceedings, to compel the determination of the conflicting claims. *Fisher v. Hopburn.* 41
  2. Where rents were due from one tenant in common at the time of the death of another, the administrator of the latter is a proper party to an action of partition, as he is entitled to receive the rents due his intestate at the time of his death. *Scott v. Guernsey.* 106
  3. Under the provisions of the act of 1860, concerning the rights and liabilities of husband and wife (Laws of 1860, chap. 40), as amended in 1862 (Laws of 1862, chap. 172), the paraphernalia of a wife, given her by her husband, which, prior to those statutes, was her separate estate in equity, became clothed with all the incidents of a legal estate; and, for an injury to or conversion thereof, she is the proper person to bring suit. *Rauzon v. Pa. R. R. Co.* 212
  4. The personal representatives of a deceased vendor are necessary parties to an action to compel a specific performance of his contract of sale. Where, however, the heir alone is made defendant, and the defect appears upon the face of the complaint, if no demurrer is interposed, the defect is to be deemed waived, and his right to object is at an end. *Potter v. Ellice.* 321
  5. Trustees, in whom is the title to a trust fund, are the proper parties plaintiff in an action to maintain and defend the fund against wrongful attack or injury, tending to impair its safety or amount. Neither the *cestui que trust* nor beneficiaries can maintain such action against a third person, except in case the trustees refuse to perform their duty, and then the trustees should be made parties defendant. *W. R. R. Co. v. Nolan.* 518
  6. Assessors are *quasi* judicial officers; their assessments are in the nature of judgments. They are

not subject to an action to review, modify or reverse their judgments, nor to hold them to personal liability, when acting within their jurisdiction. Their judgments can be reversed by action for fraud, mistake or other cause, giving jurisdiction to courts of equity; but it is the parties affected by the judgment who must be brought into court to litigate, not the judges. *Id.*

7. It is ministerial, not judicial officers, whom the court has power to restrain when proceeding illegally under a claim of right. The process of injunction, in a proper case for staying a judgment, goes against the parties, not the tribunal or its judges. *Id.*

8. Where, in an action brought by two plaintiffs, they fail to establish a joint interest, but a separate cause of action in favor of one of the plaintiffs is established, the court has power, under section 274 of the Code, to give judgment in favor of the one and against the other, but it is not bound so to do, and a judgment against both is not erroneous. *Callins v. Smith.* 614

9. Plaintiff and one S. were partners. Upon dissolution they entered into a written agreement, by which S. assigned and transferred all his rights and interest in the assets of the firm to plaintiff, who was to collect all the accounts, etc., and pay the firm debts, and with the share of S. in the residue, and the avails of certain individual property also transferred, to pay certain paper made in the firm name by S. for his individual benefit; the balance, if any remained, to be paid to S. In an action brought by plaintiff to recover a debt due the firm,—*Held*, that S. was not a necessary party plaintiff. *Phillips v. Clark.* 677

## PARTITION.

1. Where, during the existence of a life estate, certain of the devisees of the remainder, with full know-

ledge of the limited title of the tenant for life, and without the consent of the other remaindermen, erected buildings upon the premises devised,—*Held*, that they were not entitled to any compensation therefor, and, upon partition, could not exact a reimbursement from, or claim a lien upon, the shares of their co-tenants. *Scott v. Guernsey.* ✓ 106

2. The remedy by an action, for rents, by one tenant in common against another, is cumulative, and does not bar the equitable adjustment of them on a partition in equity. *Id.*

3. The rents on a partition are a lien upon the shares or interest of any co-tenant from whom they may be due. *Id.*

4. Where rents were due from one tenant in common at the time of the death of another, the administrator of the latter is a proper party to an action of partition, as he is entitled to receive the rents due his intestate at the time of his death. *Id.*

5. It is a matter of discretion with the court below to direct a sale instead of actual partition, and unless the error is clear, its decision will not be overruled. *Id.*

## PARTNERSHIP.

1. In forming a copartnership the parties can stipulate as between themselves that one partner shall be free from liability for loss, or that his liability be limited, and where one is to have a share of the profits of a business in consideration of his share of capital invested and imperiled therein, whatever may be the intent of the parties, this, as to third persons, makes him a partner. *Ontario Bank v. Hennessey.* 545

2. Where, in a copartnership agreement between A. and B., no firm name is expressly adopted, but A. is to give his personal attention to and have entire control and man-

agement of the business, with authority to arrange and negotiate the acceptance of drafts, B. to incur no risks and to assume no responsibility, it is a fair inference that the copartnership business is to be done in the name of A., and B. is liable upon a draft drawn by A. in his individual name, procured to be discounted by him for the benefit of the firm, and avails applied to its use, although at the time the draft was discounted B. was not known to the payee as a partner. (GRAY, C., dissenting.) *Id.*

3. Where one member of a partnership, in order to pay his individual debt, makes his promissory note and indorses it in the firm name, without the knowledge or consent of his copartners, and the creditor with knowledge of the facts receives the note, and in order to bind the firm transfers it before maturity to a *bona fide* holder, the creditor is guilty of a fraud and is liable therefor. But the fraud is not upon the firm; it is only upon those who did not consent to the indorsement. The cause of action arising therefrom is no part of the assets of the firm, although the note has been paid out of such assets, and title thereto does not pass by a general assignment of all the property and effects of the firm, nor is any interest therein conveyed by an assignment made by one of the parties injured of his right and interest in the partnership assets. (LORT, Ch. C., and GRAY, C., dissenting.) *Calkins v. Smith.* 614

4. Such a fraud does not work a joint injury for which the injured partners can unite in a common-law action. The damage sustained by each is in proportion to his interest in the partnership, and he must bring a separate suit to recover it. (EARL, C.) *Id.*

*See Baldwin v. Bald* (Mem.), 678.  
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## PATENTS.

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## PAYMENT.

An entry was made upon the journal of a bank in the regular day's business, charging certain mortgages held by the bank to the president and principal stockholder, who was the mortgagor, against a credit to him of a larger amount appearing upon the books of the bank. The book-keeper, who made the entry, had no recollection of the transaction. The mortgages were subsequently transferred by the bank to a *bona fide* purchaser for their face, the president and the bank representing them to be wholly unsatisfied and valid liens. In an action by a subsequent incumbrancer to remove the liens of the mortgages,—*Held*, that the entry alone, without some evidence of its adoption by the mortgagor and the bank, was not sufficient proof of the payment of the mortgages; and the subsequent action of both in negotiating the mortgages rebutted any inference of acquiescence or adoption. (LORT, Ch. C., dissenting.) *Whitcomb v. Bk of Cooperation.* 239

## PERSONAL PROPERTY.

*See CHATTEL MORTGAGES.*  
 RECOVERY OF POSSESSION OF  
 PERSONAL PROPERTY.

## PLANK-ROAD COMPANIES.

As under the provisions of the "Act to provide for the incorporation of companies to construct plank-roads," etc. (chap. 210, Laws of 1847), in order to enforce the personal liability given by said act (§ 44) against stockholders, provision is made that a joint action may be prosecuted against the company and any one or more stockholders liable to contribute to the payment of its debts, the moment a cause of action accrues against the company it accrues against each stockholder liable, and as to them the statute of limitations begins to run. If

therefore an action against a stockholder is not commenced within the period prescribed by the statute of limitations, it is barred. (EARL, C., dissenting.)  
*Conklin v. Furman.* 537

PLEADINGS.

1. An admission in an answer that a deed was executed to the defendant is, in effect, an admission that the deed was signed, sealed and delivered. *Thorp v. Keokuk.* 253
2. Defendant agreed to run plaintiff's boat from Oswego to Martinsburgh; "risk of navigation assumed" by plaintiff. Defendant was prevented from performing by the fact that the boat was too large to pass through the locks on the Black River canal. Defendant alleged, in his answer, that by the verbal agreement between the parties, in pursuance of which the written contract was intended to be drawn, it was understood that the risk, as to the practicability of the boat passing through the locks, was to be, and it was understood by them was, assumed by the plaintiff, and asked to have the written contract reformed to correspond with the agreement, should such correction become necessary. The court below decided that the words in the contract did not include this risk. *Held*, that, with this construction, the answer sufficiently showed a mutual mistake, and that defendant was entitled under it to introduce evidence as to the original agreement. *Pitcher v. Hennessey.* 415
3. Extrinsic averments are not necessary in a complaint in an action of libel where the words used, giving them their natural construction, tend to injure the reputation of the subject, and expose him to hatred, contempt or ridicule. *More v. Bennett.* 473
4. The complaint in this action charged, in substance, that defendant published an article wherein the writer, after stating that a certain woman was a prostitute, al-

leged that, as he understood, she was under the patronage or protection of the plaintiff. The complaint alleged that this charge was false and malicious, and tended to blacken and injure plaintiff's reputation, and expose him to public contempt. Plaintiff was nonsuited upon the ground that the complaint did not state a cause of action, as it contained no averment that the publication intended to charge that the prostitute was under plaintiff's protection for illicit purposes. *Held*, error; that the intent to charge a criminal patronage or protection was manifest in the publication; the complaint was sufficient, therefore, without such averments. *Id.*

5. The complaint in an action of slander, where the words charged are not actionable *per se*, must allege special damage. A general allegation that the slanderous charge injured the plaintiff in her good name, and caused her relatives and friends to alight and shun her, is insufficient. *Bassell v. Elmore.* 561
6. Under a single count in an action of slander, plaintiff may prove a repetition of the same slanderous charge, for the purpose of showing the degree of malice, and thus enhancing the damage. So, also, when the words charged are not actionable *per se*, but the plaintiff has alleged and proven special damage, she may show a repetition of the charge, although not spoken in the presence or brought to the knowledge of the one through whose action plaintiff sustained the special damage. *Id.*

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*Whitehouse v. Bk of Cooperstown.* 239

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*See* PARTIES, 4.

## PLEDGE.

*See* CONSIGNOR AND CONSIGNEE, 2.  
OFFICE AND OFFICER, 1, 2, 3, 4, 7

## POLICE (SUPERINTENDENT OF).

*See Green v. Kennedy* (Mem.), 653.

## PRACTICE.

See MOTIONS AND ORDERS, 2.

## PRESUMPTIONS.

See COVENANTS, 2, 3.

FIXTURES, 2.

INSURANCE (FIRE), 1.

SALES, 2.

*Baldwin v. Baldwin* (Mem.), 673.

## PRINCIPAL AND AGENT.

1. In an action for conversion of personal property, defendants justified under a judgment and execution against a third person who carried on business in plaintiff's name, as her agent, and with materials and labor purchased and procured upon her credit. The property levied upon was thus manufactured. Upon the trial defendants offered to prove that plaintiff allowed the execution debtor to use her name and credit to carry on business for his sole benefit. The court excluded the evidence. The court also refused to submit to the jury the question whether such an arrangement was fraudulent and void as to creditors. *Held*, no error; that no fraud could be deduced therefrom. *Smith v. Van Olinda*. 169

2. One who authorizes another to use his name, in the conducting and carrying on of a business, is liable for the debts incurred in such business, although he has no beneficial interest therein. *Ferris v. Kümer*. 300

3. Where one sells goods to an agent of a known principal, for use in the business of the principal, the presumption is that he gave credit to the principal, and, to shift the responsibility to the agent, the proof should be satisfactory that the vendor sold upon the credit of the agent alone. *Id*.

4. H. K., being insolvent, carried on business in the name of C. K., who had no interest in the profits, but

allowed his name to be used as a cover. Plaintiff was aware of the arrangement and the reasons therefor; he sold to H. K. a quantity of butter for the business; the purchase was made in the name of C. K., bill made out in his name, and the butter delivered at the store. *Held*, that C. K. was liable therefor. *Id*.

5. An authority to deliver goods to a common carrier for transportation includes all the necessary and usual means of carrying it into effect. It can only be executed by obtaining the consent of the carrier to receive them, and the agent is therefore authorized to stipulate for the terms of transportation. *Nelson v. H. R. R. Co*. 496

6. The naming of a bank in a promissory note as the place of payment, does not make the banking association an agent for the collection of the note or the receipt of the money. No power, authority or duty is thereby conferred upon it in reference to the note. *Hills v. Place*. 520

See BAIL, 2.

RAILROAD CORPORATIONS, 9.

SHERIFF, 2.

*Douglass v. Dudley* (Mem.), 688.

## PRIVILEGED COMMUNICATIONS.

Plaintiff charged the paternity of her bastard child upon defendant's son. *Held*, that the fact that defendant was engaged in an attempt to settle the matter between plaintiff and his son did not authorize him to blacken her character; and a charge made by him, while so engaged, that she was a public prostitute, was not a privileged communication. *Basell v. Elmore*. 561

## PROCEEDINGS AGAINST SHIPS AND VESSELS.

See SHIPPING, 2, 3, 4, 5, 6, 7.



PROVOST MARSHALS.

See OFFICE AND OFFICER, 1, 2, 3, 4.

PUBLIC POLICY.

See OFFICE AND OFFICER, 4, 5.  
*Brackett v. Wyman* (Mem.), 667.

QUESTIONS OF LAW AND FACT.

See APPEAL, 3, 4.

RAILROAD CORPORATIONS.

1. In assessing the real estate of a railroad corporation, assessors are not required to assess it as an isolated piece of land, but each piece of property is to be estimated in connection with its position, its incidents, and the business and profits to be derived therefrom. *The People ex rel. v. Barker*. 70
2. The real estate of railroad corporations, occupied and used by them for railroad purposes, cannot properly be assessed as "non-resident lands." *Id.*
3. The provisions of the Revised Statutes for the assessment of taxes upon incorporated companies (1 R. S., 414, *et seq.*) furnish a sufficient basis for the assessment and taxation of the lands of railroad corporations, in those towns and counties remote from its principal place of business. *Id.*
4. The assessors in those towns are not required to make the entries upon their rolls required for the purpose of fixing a basis of a tax upon the capital of the corporation. (Subs. 1 and 2, § 6, 1 R. S., 415.) Those directions are appropriate to the assessors of the town or ward where the principal place of business is located, upon whom the duty of assessing the capital is devolved. Where the duty is not

devolved the directions are not applicable. *Held*, also, that within the provisions of the laws for the assessment and collection of taxes, railroad corporations are residents of the towns through which the railroad passes. *Id.*

5. A railroad corporation which passes through and occupies lands in several counties for the carrying on of its corporate business, is, for the purposes of taxation, to be regarded as a resident of each town and county through which it passes. Its real estate is, therefore, properly assessed *in personam* as the land of a resident, and not as non-resident land. *The B. & S. L. R. R. Co. v. Supervisors, etc.* 93
6. The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice, printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried. *Rauvson v. Pa. R. R. Co.* 212
7. If, however, the passenger's attention is called to it when purchasing his ticket, or if he knew of it when he purchased, the law will presume, in the absence of any objection upon his part, that he assented to the terms. The contract is made, and rights and duties of the parties are determined, when the ticket is purchased. A discovery by the passenger of the notice after he has entered upon his journey does not affect his rights. *Id.*
8. The railroad act (chapter 140, Laws of 1850), fixes no tariff or rate of freight. This is a subject of contract solely. The agreement to carry is a consideration for the agreement to pay the freight. The liability to pay freight is the consideration for the agreement to carry. The parties may fix such reasonable rates as they may agree upon, and they may make such limitations to the liability of the carrier as they think proper. *Nelson v. H. R. R. R. Co.* 498
9. Plaintiff purchased of K., W. & Co. a mirror, directing them to

deliver it to the defendant for transportation to Fulton, N. Y. K., W. & Co. sent it by a cartman to defendant's depot. The agent in charge refused to receive it unless the cartman would sign a contract releasing the company from liability for breakage, etc., unless caused by collision resulting from negligence of its servants, in consideration of its agreement to carry at tariff rates. The contract contained a clause that if objection was made to it the freight agent was to be notified before the property was shipped. K., W. & Co. knew of the custom of the company to require such a contract before receiving goods liable to extra hazards. The cartman signed as agent for shipper and owner. It was agreed that the mirror should be retained until the next day, and should be returned if K., W. & Co. requested. The cartman delivered a duplicate of the contract, and stated the facts to K., W. & Co. No dissent or request to return having been made by the latter, the mirror was forwarded and was broken *in transitu*. *Held*, that K., W. & Co. were authorized to make the contract on behalf of plaintiff; that they could depute the cartman to make it for them; that there was a complete ratification of his acts, and that the contract made by him was valid and binding upon plaintiff. *Id.*

#### REAL PROPERTY.

*See* DETERMINATION OF CLAIMS TO REAL PROPERTY.  
FIXTURES.

#### RECEIPTS.

Where, upon payment of a portion of an undisputed account, the creditor gives a receipt in full, he is not concluded thereby from recovering the balance, although the receipt was given with knowledge, and there was no error or fraud. *Ryan v. Ward.* 204

#### RECEIVERS.

*See* COUNTY COURT.

#### RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

*See* SHERIFF, 1.

#### RELEASE.

*See* COVENANTS, 2, 3.  
INSOLVENCY.

#### REFEREE.

*See* FINDINGS OF LAW AND FACTS.

#### REMEDIES.

The remedy by *certiorari* is the proper one to review an assessment. *W. B. R. & Co. v. Nolan.* 573

*See* ASSESSMENT AND TAXATION.  
ELECTION OF REMEDIES.

#### RENT CHARGE.

*See* COVENANTS, 2, 3.

#### REPEAL.

*See* STATUTE, 9.

#### SALARY.

*See* CORPORATIONS.

#### SALES.

1. Whether a delivery under an agreement for the sale of chattels is absolute or conditional, depends upon the intent of the parties; to establish that the delivery was condi-

tional, it is not necessary that the vendor should declare the conditions, in express terms, at the time of delivery. It is sufficient if the intent of the parties can be inferred from their acts, or the circumstances of the case. *Hammett v. Linneman*. 899

2. Although delivery, without requiring payment, is presumptive evidence of the waiver of a condition that payment should be made upon delivery to vest title in the vendee, yet this presumption may be rebutted by the acts or declarations of the parties showing a contrary intent; and the intent, where any doubt arises, is a question of fact. *Id.*

3. Plaintiff sold to defendant L. a quantity of coal for cash on delivery; L. asked for a credit, which was refused; plaintiff knowing that L. was about failing. The coal was delivered, and carted to L.'s yard, and mixed with other coal. Three days after delivery, plaintiff again called for payment; not obtaining it, he called again, in two or three days; L. stated he could not pay. The agent learning that L. had sold out, asked him what he had done with plaintiff's coal. He admitted he had sold it, adding he could not help it. Declarations of defendants were testified to, tending to prove that L. had given to defendant B. a bill of sale of the coal, before delivery. When the sheriff seized the coal, under process in this action, L. said: "It looks so much like a swindle, I am ashamed of it." *Held* (EABL and GRAY, CC., dissenting), that there was sufficient evidence to justify the finding that the payment of the price was a condition precedent to the vesting of the title in L., and that such condition had not been waived. *Id.*

*See* FRAUDULENT CONVEYANCES.  
STATUTE OF FRAUDS, 1, 6.

## SCHUYLER COUNTY.

*See* JUDGMENTS, 2, 3.

## SEAL.

*See* CONTRACTS, 22.

## SETTLEMENT.

*See* COMPROMISE.

## SET-OFF.

*See* *Smith v. Fox* (Mem.), 874.

## SHERIFF.

1. In an action for the recovery of possession of personal property, the defendant was arrested under the provisions of subdivision 3 of section 179 of the Code, and, upon giving the undertaking required by section 187, in such cases, was released from arrest by the sheriff, who thereupon returned the order of arrest to plaintiff's attorney. Plaintiff excepted to the bail; they failed to justify, but prior to the expiration of the time for justification, surrendered the defendant to the sheriff, in whose custody he remained. Plaintiff subsequently recovered judgment for the delivery of the property, or payment of its value, with costs. *Held*, that the surrender by the bail was unauthorized, and did not exonerate them, and that, under section 201 of the Code, the sheriff was liable as bail; which liability was not satisfied by having the defendant within his custody, amenable to process, but that, as far as the plaintiff was concerned, he stood in the place of the bail in the undertaking given to him, and the extent of his liability was measured by theirs. *McKenzie v. Smith*. 143

2. Where a deputy sheriff, after he had returned an execution *nulla bona*, with the consent of the plaintiff's attorney and the county clerk, procured the same from the clerk's office, erased the return, and, by virtue thereof, levied upon and sold property,—*Held*,

that the execution was irregular, but not void, and that the deputy having treated it as valid process, neither he nor his principal could refuse to answer for the money collected thereon. (GRAY, C., dissenting.) *James v. Gurley*. 163

### SHIPPING.

1. The provision in the State Constitution, that no person shall be deprived of property, etc., without due process of law (art. 1, § 6), does not require a legal proceeding according to the course of the common law, nor must there be a personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on, and an opportunity offered him to defend. The opportunity to defend must not be colorable and illusory; but it matters not, though it may be difficult, so long as it is not impracticable. *Happy v. Mosher*. 813
2. The act of 1862 (chap. 482, Laws of 1862), providing for "the collection of demands against ships and vessels," is not repugnant to the above mentioned provision, as it provides a reasonable notice and gives an opportunity to litigate the lien. *Id.*
3. An omission to state in the application to the county judge the time and place of filing the specification of the claim, does not invalidate proceedings under that statute where the vessel has not departed from the port. *Id.*
4. The giving of the bond required by the act is a waiver of any technical defect in the prior proceedings. *Id.*
5. The obligation of the bond can only be discharged by showing that no debt was due or that no lien existed. *Id.*
6. Where the person furnishing the lumber accepted the note of the

contractor building the vessel for the amount of the claim payable in three months.—*Held*, that this extended the time of payment in the absence of an agreement that it should not have that effect, and until the note was due proceedings could not be instituted under the act to enforce its collection. *Id.*

7. In an action upon a bond given under the provisions of said act, in order to prove that the lumber was used in the construction of the vessel, the plaintiff was permitted to prove, under objection, the declarations and admissions of the contractor and his agent, made after the delivery of all the lumber. *Held*, error; that the contractor was in no sense the agent of the owner, and there was no such relation between them as to make his declarations competent against the latter or his sureties. *Id.*

*See* INSURANCE (MARINE).

### SLANDER.

1. The complaint in an action of slander, where the words charged are not actionable *per se*, must allege special damage. A general allegation that the slanderous charge injured the plaintiff in her good name, and caused her relatives and friends to slight and shun her, is insufficient. *Bassell v. Elmora*. 561
2. Under a single count in an action of slander, plaintiff may prove a repetition of the same slanderous charge, for the purpose of showing the degree of malice, and thus enhancing the damage. So, also, when the words charged are not actionable *per se*, but the plaintiff has alleged and proven special damage, she may show a repetition of the charge, although not spoken in the presence or brought to the knowledge of the one through whose action plaintiff sustained the special damage. *Id.*
3. The doctrine that an action of slander for words not actionable *per se*, cannot be maintained un-

less spoken in the presence, or brought directly to the knowledge of, the one who acted upon them, to the pecuniary injury of plaintiff, as laid down in *Keenholts v. Becker* (8 Denio, 348), questioned. (LEONARD, C.) *Id.*

4. Plaintiff charged the paternity of her bastard child upon defendant's son. *Held*, that the fact that defendant was engaged in an attempt to settle the matter between plaintiff and his son did not authorize him to blacken her character; and a charge made by him, while so engaged, that she was a public prostitute, was not a privileged communication. *Id.*

# SPECIFIC PERFORMANCE.

*See* CONTRACTS, 10.  
PARTIES, 4.

## STATUTES.

1. The last clause of section 1 of the "Act to amend the Revised Statutes in respect to highways" (Laws of 1861, chap. 311), which provides, that all highways that have ceased to be traveled or used as such for six years, shall cease to be highways for any purpose, is not limited, by the second section of said act, to highways "laid out and dedicated," but applies as well to highways created by twenty years' user. Said clause, however, is not retroactive in its effect, but only applies to such highways as have ceased to be traveled or used for six years after the passage of the act. (LEONARD, C., dissenting.) *Amsbury v. Hinds.* 57
2. Under the provisions of the act of 1860, concerning the rights and liabilities of husband and wife (Laws of 1860, chap. 40), as amended in 1862 (Laws of 1862, chap. 172), the paraphernalia of a wife, given her by her husband, which prior to those statutes was her separate estate in equity, became clothed with all the incidents of a legal estate; and, for an injury to or con-

version thereof, she is the proper person to bring suit. *Ransom v. Pa. R. R. Co.* 212

3. The provisions of section 8 of the act in relation to moneyed corporations (1 R. S., p. 591), which provide that no conveyance, etc., of the real estate and effects of such corporation, exceeding \$1,000 in value, shall be made, unauthorized by a previous resolution of the board of directors, do not apply to a sale, by the financial officers of a bank, of mortgages or other securities pledged to secure a loan, made to realize the money secured by the pledge. *Com. Bank v. Ten Eyck.* 305
4. The provisions of the act "to subject certain debts due to non-residents to taxation" (chap. 871 of the Laws of 1851), providing that debts due from inhabitants of this State to non-residents for the purchase of real estate shall be assessed in the name of the creditor and taxed in the town or county where the debtor resides, is applicable only to taxation in towns; and as to taxation in villages, the general law authorizing assessments to agents (1 R. S., chap. 13, title 1, § 5, as amended in 1851), remains in force. *People ex rel v. Trustees of Ogdensburgh.* 390
5. Where lands are taken under a statute authority in derogation of common-law right, every requisite of the statute having a semblance of benefit to the owner must be complied with. *Newell v. Wheeler.* 486
6. Under the provisions of the "Act to consolidate the cities of Brooklyn, Williamsburgh," etc., passed in 1854 (chap. 384, Laws of 1854), an assessment for flagging sidewalks must be made against the owner of the premises benefited, unless the land be occupied by another, in which case it may be assessed to the occupant. If assessed to one who is neither owner nor occupant, the assessment is illegal, and a sale of the premises under it void. *Id.*
7. The provision of section 10, title 5, of said act, which provides that

before issuing a warrant the assessment shall be examined and certified as correct by the street commissioner and attorney and counsel of the city, which certificate shall be conclusive evidence of the regularity of the proceedings, is only intended to cover the formal proceedings. These officers are not required to go back of the papers and records to ascertain if the persons named are in fact the owners or occupants, and their certificate is not conclusive upon this point. *Id.*

8. An assessment upon the shares of a national bank, under the act of 1865 (§ 10, chap. 97, Laws of 1865), is invalid and cannot be enforced. *First Nat. Bank of Salem v. Fancher.* 524

9. The control conferred upon congress, by the Constitution of the United States (art. 1, § 8), over the State militia, begins when they are mustered into the service of the United States. Arrangements by the States to procure or aid in calling them forth are not unauthorized, nor are regulations fixing and limiting the amount of bounties, or rewards given to procure their services; therefore, section 4, of chapter 29, of the Laws of 1865, which prohibits the payment of any sums for the procurement of volunteers, save as provided for by that act, is not in conflict with the Constitution of the United States, and an agreement to pay a sum prohibited by that section is void. *Powers v. Shepard.* 540

10. The re-enactment of certain of the sections of one act, in a subsequent one providing for a different scheme, is not a repeal by implication of those sections in the first act, nor does a provision in the second act, suspending the operation of the similar sections in that act, have the effect to suspend the operation of those in the first act. The first seven sections, therefore, of said chapter 29, of the Laws of 1865, were not repealed or their operation suspended by chapter 41 of the Laws of that year. *Id.*

11. Where several statutes *in pari materia* are passed by the same legislature, they are to be taken and construed together. *Id.*

See ASSESSMENT AND TAXATION, 1, 4, 5, 15.  
CODE OF PROCEDURE.  
DEEDS, 1.  
LIMITATION OF ACTIONS, 2.  
OFFICE AND OFFICER, 4.  
RAILROAD CORPORATIONS, 8.  
SHIPPING, 2.  
TELEGRAPH COMPANIES, 1.

## STATUTE OF FRAUDS.

1. A parol contract to manufacture and deliver a quantity of paper, such paper to be thereafter manufactured at the contractor's mills, is not within the provisions of the statute of frauds. (GRAY, C., dissenting.) *Parsons v. Loucks.* 17
2. A verbal agreement for the sale of property void by the statute of frauds cannot be ratified by an assignment by the vendor of an account against the vendee therefor. The sale can only be rendered valid by the concurrence of both the vendor and the vendee in some one of the things required by the statute to give it validity. *Hicks v. Cleveland.* 84
3. A parol promise to assume an antecedent debt of a third person, upon consideration that the creditor will cancel and extinguish the debt and release the debtor, which is done, is not within the statute of frauds, and is valid. *The M. B. Co. v. Zingsen.* 247

4. Where one furnishing men to fill the quotas of certain towns, under a call of the president, at the requirement of the provost marshal, deposited with him county bonds, under a parol agreement that they should be held as security at the rate of \$550 per man, that the men then and thereafter to be furnished by him should not desert before reaching the place of rendezvous, — *Held*, that the agreement was void, under the statute of frauds, it being an agreement to answer

for the default or miscarriage of another, and was not so far executed, by the delivery of the securities, as to give the officer an interest in or right to retain them. *Richardson v. Crandall.* 848

take the case out of the statute of frauds, and the employer is not liable under the contract. *Oddy v. James.* 685

*See Brand v. Brand* (Mem.), 675.

5. S., being the owner of a block of stores numbered 1, 2, 3 and 4, respectively, constructed a railway transversely through the cellars of Nos. 1, 2 and 3 for the benefit of No. 4. He sold and conveyed to different purchasers Nos. 1, 2 and 3, reserving in the deed the railway and the right to himself and assigns to pass and repass at pleasure. Subsequently the owners of Nos. 1, 2 and 3, being desirous of extinguishing the right of way and closing up the openings for the railway, purchased No. 4. In the deed thereof, S. relinquished to the grantees all his right and title to the railway, and thereupon the owner of No. 2 built a solid stone wall between it and No. 3, without objection from the owner of the latter. The owner of No. 3 having subsequently become sole owner of No. 4, claimed the right of way, upon the ground that the agreement to extinguish it was by parol and therefore void. *Held*, that the right of way, having been created by deed, was not extinguished by non-user, and that it was a freehold interest, but that the parol agreement, having been partially performed, was valid and operative as an equitable estoppel to extinguish the right of way. *Pope v. O'Hara.* 446

6. A contract to cut trees standing upon the contractor's land into cord-wood and to deliver the wood at so much per cord, is not a contract for the sale of an interest in lands, and a writing is not necessary to give it validity. *Killmore v. Howlett.* 569

7. Where a verbal agreement is entered into for the work and labor of one of the parties for a year, to commence *in futuro*, an entry upon the employment, with the acquiescence of the employer, but without a new contract, does not

## STATUTE OF LIMITATIONS.

### *See* LIMITATION OF ACTIONS.

## STEAMBOATS.

1. The acts of congress providing for the better security of the lives of passengers on board of vessels propelled by steam, etc. (act of July 7, 1838, amended by act of August 30, 1852), does not take away or impair the common-law right of action by a person injured, while a passenger upon such a vessel. *Swarthout v. N. J. Steamboat Co.* 209

2. An inspection of the boilers by the proper United States inspector, as prescribed by said act, and a certificate of inspection that in his opinion the vessel, her boiler and machinery, came up to the requirements of the act, is not conclusive, and does not exonerate the owner from liability. *Id.*

## STIPULATIONS.

*See* TRUSTS AND TRUSTEES, 1.

## STOCKS.

*See* NOTICE OF SUIT PENDING, 3.

## SUBSCRIPTION.

*See* W. & A. Col. Institute v. Blackmar (Mem.), 663.

## SUPPLEMENTARY PROCEEDINGS.

1. Sections 292 and 294 of the Code furnish a substitute for the creditor's bill, as formerly used. The service of the order, under those sections, takes the place of the commencement of a suit under the old system, and gives the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of the debtor. *Lynch v. Johnson.* 27
2. A final order of a judge, in proceedings under section 294, requiring the debtor of a defendant to pay his debt to the plaintiff, renders this lien effectual; and payment, or liability to pay, in pursuance of such order, is a defence to the debtor in an action against him by his creditor, or by an assignee who is not shown to be a *bona fide* purchaser for value of the claim, prior to the accruing of the lien. *Id.*
3. A judgment recovered by a debtor against his creditor for an unlawful levy upon and sale of exempt property, cannot be reached by the creditor through proceedings supplementary to execution. Such judgment represents the property for the value of which it was recovered. The proceeds of the judgment will be protected as exempt property until sufficient time has elapsed to afford the debtor a reasonable opportunity to again purchase the exempt property. *Tillotson v. Wolcott.* 188
4. The County Court has jurisdiction to order a receiver appointed by it, in proceedings supplementary to execution, to release to the debtor a judgment recovered by him for an unlawful seizure and sale of exempt property. *Id.*

## SUPERIOR COURT OF BUFFALO.

The Superior Court of the city of Buffalo has jurisdiction of an action against the board of super-

visors of Erie county, where the summons is served upon the chairman or clerk of the board in that city. *The B. & S. L. R. R. Co. v. Supervisors.* 98

## TAXES.

*See* ASSESSMENT AND TAXATION.

## TELEGRAPH COMPANIES.

1. Although telegraph companies, organized under the general laws of this State and the acts amendatory thereof (chapter 265, Laws of 1848; chapter 559, Laws of 1855, etc.), may be termed common carriers in the sense that they are engaged in a public employment and bound to transmit all messages, the common-law liability of common carriers does not attach to them. They do not insure the safe and accurate transmission of messages. They are bound to transmit them with care and diligence adequate to the business which they undertake. *Breece v. U. S. Tel. Co.* 132
2. They have the right to make reasonable rules for the conduct of their business, and can limit their liability for mistakes not occasioned by gross negligence or willful misconduct, by notice brought home to the sender of the message or by special contract. *Id.*
3. Where the blanks furnished by the company, upon one of which the message was written, had been for some time in the possession of the sender, which blanks contained an agreement between the signer and the company that the company would not be responsible for any error in the transmission of the message, unless it was repeated, *Held*, it must be presumed that the sender understood the contents of the blank and accepted the terms, and he is estopped from denying or disputing the agreement. *Id.*



## TENANTS IN COMMON.

One H. worked plaintiff's farm under a contract, in and by which plaintiff agreed to let the farm to H. to work on shares upon certain conditions, among others, that plaintiff was to account and pay to H., in consideration of the premises, and for his performance, the value of one-half of all the grain, etc., produced from the farm. *Held*, that the parties were not tenants in common of the crops, but that plaintiff had exclusive title thereto. *Tanner v. Hills*. 662 ✓

See PARTITION, 1, 2, 3, 4.  
*Pike v. Walter* (Mem.), 681.

## TITLE.

1. One who furnishes the credit, and in whose name a business is carried on, is the legal owner of the property purchased upon his credit and employed in the business, although the beneficial interest in the business is in another. *Smith v. Van Olinda*. 169

2. A person upon whose lands a tree wholly stands is the owner of the whole thereof, and is entitled to all its fruit, notwithstanding some of its branches overhang the lands of another. *Hoffman v. Armstrong*. ✓ 201

3. When one purchases land, and at his request the same is deeded to another, although the purchaser receives and retains the deed, without disclosing the existence thereof to the grantee, and takes and retains possession of the land, yet by the deed the title passes and becomes vested in the grantee, and under the prohibitions of the statute of uses and trusts (1 R. S., 728, § 51) no trust results in favor of the purchaser. *Everett v. Everett*. ✓ 218

4. As coverture does not prevent the acquisition of property by a married woman, the fact of coverture does not affect the title to stock transferred by her; and

where the stock stands in her name the certificate is evidence of its absolute ownership by her; and in case there is nothing in it or connected with it indicating a trust in favor of another person, one loaning money upon pledge of the stock as security is warranted in making the loan upon the assumption of such ownership; he is not bound to inquire and ascertain how she obtained it. *Leitch v. Wells*. 585

5. The legal title to the stock of a bank passes by an assignment and delivery of the certificate therefor, although there is no transfer upon the books of the bank. *Id*.

6. One H. worked plaintiff's farm under a contract, in and by which plaintiff agreed to let the farm to H. to work on shares upon certain conditions, among others, that plaintiff was to account and pay to H., in consideration of the premises and for his performance, the value of one-half of all the grain, etc., produced from the farm. *Held*, that the parties were not tenants in common of the crops, but that plaintiff had exclusive title thereto. *Tanner v. Hills*. 662

See ASSIGNMENTS, 1, 2.

BAILMENTS, 4.

CLOUD ON TITLE.

CONSIGNOR AND CONSIGNEE, 1.

CONTRACTS, 24.

CONVERSION, 2.

COSTS, 1.

EVIDENCE, 8.

FRAUDULENT CONVEYANCES.

*Pike v. Walter* (Mem.), 681.

## TRADE MARKS.

1. A manufacturer has the right to distinguish the goods manufactured by him by any peculiar mark or device he may select and adopt, by which they may be known as his in the market; and he is entitled to the protection of a court of equity, in the exclusive use of the peculiar marks or symbols appropriated by him, designating or indicating the true *origin* or ownership of the article to which

they are affixed. *Gillott v. Esterbrook*. 374

2. Plaintiff, a manufacturer of steel pens, had for many years manufactured a peculiar pattern on which was impressed the figures "303," and the words "Joseph Gillott, extra fine." The pens were put up in paper boxes, with a label on top, containing the same name and numerals. The pens were known and ordered by dealers as "303" pens. Such figures did not express any quality or size of the pen, but were selected arbitrarily by plaintiff to distinguish the pattern or character of pen to which it was applied. Defendants began the manufacture and sale of a steel pen, closely resembling plaintiff's pen in every particular, on which was stamped "303," and "Esterbrook & Co., extra fine." The pens were put up in boxes of the same size and similar to those of plaintiff, with a label containing the same words and figures, except "Esterbrook & Co.," instead of "Joseph Gillott." In an action brought by plaintiff to restrain defendants from using the figures "303" upon these pens and boxes,—*Held*, that plaintiff had acquired the right to the exclusive use of those figures as a trade mark, and was entitled to the relief sought. *Id.*

### TREES.

1. A person upon whose lands a tree wholly stands is the owner of the whole thereof, and is entitled to all its fruit, notwithstanding some of its branches overhang the lands of another. *Hoffman v. Armstrong*. 201
2. A contract to cut trees standing upon the contractor's land into cord-wood and to deliver the wood at so much per cord, is not a contract for the sale of an interest in lands, and a writing is not necessary to give it validity. *Killmore v. Elmore*. 569

### TRESPASS.

1. Where, in an action of trespass, defendant claims title to the *locus in quo* by adverse possession, the declarations of a former occupant under whom defendant claims are admissible as evidence, to characterize his possession as adverse to any title of the plaintiff; and this is competent under a general plea of title, without allegations that title is claimed by adverse possession. *Morse v. Salisbury*. 686.
2. In an action of trespass in Justice's Court, defendant pleaded title to a portion of the premises; that action was thereupon discontinued and one commenced in the Supreme Court, wherein the pleadings were substantially the same. Defendant succeeded on the issues affecting the premises as to which title was pleaded. Neither possession of nor title to the residue was made a question upon the trial by defendant, and the amount of the recovery for trespass thereon was less than fifty dollars. *Held*, that, under section 61 of the Code, the costs in such case are to be governed by the decision and judgment on the issue presented by the plea of title; that plaintiff, by claiming title to land not owned by him, caused all the costs which accrued in the Supreme Court; he, therefore, could not recover costs, but was properly chargeable with defendant's. *Id.*

### TRIAL.

1. In an action for conversion of personal property, defendants justified under a judgment and execution against a third person who carried on business in plaintiff's name, as her agent, and with materials and labor purchased and procured upon her credit. The property levied upon was thus manufactured. Upon the trial defendants offered to prove that plaintiff allowed the execution debtor to use her name and credit to carry on business for his sole benefit. The court excluded the evidence. The court also re-

fused to submit to the jury the question whether such an arrangement was fraudulent and void as to creditors. *Held*, no error; that no fraud could be deduced therefrom. *Smith v. Van Olinda*. 169

2. The personal representatives of a deceased vendor are necessary parties to an action to compel a specific performance of his contract of sale. Where, however, the heir alone is made defendant, and the defect appears upon the face of the complaint, if no demurrer is interposed the defect is to be deemed waived, and his right to object is at an end. *Potter v. Ellice*. 321

3. In such an action against the heir, the complaint alleged the appointment of W. and R. as administrators of the deceased vendor. At the close of the testimony, defendant's counsel moved to dismiss complaint, upon the ground that said W. and R. were not made parties, which motion was denied. No reference was made in the motion to their representative capacity. *Held*, that defendant was not charged with the protection of the rights of the administrators, and could only complain of what injured him; that, in order to raise the question upon appeal of a non-compliance with the requirements of section 122 of the Code, which directs the court, where a complete determination of the controversy cannot be had without the presence of other parties, to cause them to be brought in, defendant should have called the court's attention thereto, obtained a ruling and taken an exception upon the trial; and that the motion was not sufficiently specific to raise the question and give defendant the benefit of an exception that the administrators, as such, were not made parties. *Id.*
4. In an action of trover for the conversion of a written obligation, the defendant is supposed to have it in his possession or under his control, and no notice to produce it upon the trial is necessary to enable plaintiff to give parol evidence as to its contents; the ac-

tion itself is notice. *Hotchkie v. Mosher*. 478

See EVIDENCE, 3.

MISTAKE, 6.

PLEADINGS, 5, 6.

*Green v. Kennedy* (Mem.), 653.

*Terry v. Wait* (Mem.), 657.

*Taylor v. Spader* (Mem.), 664.

## TROVER.

See TRIAL, 4.

## TRUSTS AND TRUSTEES.

1. C., the trustee of an express trust, brought an action of ejectment against defendant to recover possession of the premises deeded to him in trust. In the deed it was provided that the trustee might release or sell the trust estate only under the control and direction of the Supreme Court. For the purpose of discontinuing that action, C. executed a stipulation, under seal, containing this clause: "In consideration of the consent of defendant that this suit be discontinued, I hereby release him from all claims and demands of every description relating to the property." Upon his stipulation the court granted an order dismissing the complaint. C. having died, plaintiff was appointed trustee and brought ejectment. Defendant offered the stipulation in evidence, which was objected to and objection sustained. *Held*, no error. The stipulation could not operate as a release or conveyance, as then it would be a conveyance in violation of the trusts, and the granting the order thereon was not a direction or sanction to such release or sale.  *Fitzgerald v. Topping*. 438
2. Trustees, in whom is the title to a trust fund, are the proper parties plaintiff in an action to maintain and defend the fund against wrongful attack or injury, tending to impair its safety or amount. Neither the *cestuis que trust* nor beneficiaries can maintain such action against a third person, except in

case the trustees refuse to perform their duty, and then the trustees should be made parties defendant. *W. R. R. Co. v. Nolan.* 518

3. Where a certain sum is bequeathed to executors in trust to pay the interest thereof at a fixed and stated rate to one, and upon his death to divide the principal among others, the executors cannot, without the consent of the *cestuis que trust*, or, in case they are infants, without an order of the court, set apart and appropriate bank stocks to the satisfaction of the trust, and release the residue of the estate from its liability to perform the trust. *Leitch v. Wells.* 585

4. The *cestuis que trust* may assent to and accept such an appropriation; but if, before this is done, new interests and new parties have intervened, the situation of the property at the time of such intervention must determine the rights of all who claim to be interested in it. *Id.*

5. An executor has a right to sell and transfer stocks and other securities of the estate, and one who buys in good faith, paying in money the price agreed upon, or who loans money upon security of the property, is not responsible for the application of the purchase-money or money loaned, and his right to the property transferred is not affected by knowledge upon his part of the existence of a claim for a legacy or a debt against the estate generally. *Id.*

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 1.

## TWO-THIRD ACT.

See INSOLVENCY.

## USES AND TRUSTS (STATUTE OF).

See DEEDS, 1.

## VENDOR AND VENDEE.

1. In executory contracts for the sale of personal property, if the vendee deems the article received not the one contracted for, to preserve his rights he must return it to the vendor, or notify him of his objections and offer to return it. The retention of the property, without doing this after opportunity to ascertain the defect, is an admission that the contract has been performed. *Beck v. Sheldon.* 365
2. Whether a delivery under an agreement for the sale of chattels is absolute or conditional, depends upon the intent of the parties; to establish that the delivery was conditional, it is not necessary that the vendor should declare the conditions, in express terms, at the time of delivery. It is sufficient if the intent of the parties can be inferred from their acts or the circumstances of the case. *Hammitt v. Linneman.* 899
3. Although delivery, without requiring payment, is presumptive evidence of the waiver of a condition that payment should be made upon delivery to vest title in the vendee, yet this presumption may be rebutted by the acts or declarations of the parties showing a contrary intent, and the intent, where any doubt arises, is a question of fact. *Id.*
4. Plaintiff sold to defendant L. a quantity of coal for cash on delivery; L. asked for a credit, which was refused; plaintiff knowing that L. was about failing. The coal was delivered, and carted to L.'s yard, and mixed with other coal. Three days after delivery, plaintiff again called for payment, not obtaining it. He called again, in two or three days; L. stated he could not pay. The agent, learning that L. had sold out, asked him what he had done with plaintiff's coal. He admitted he had sold it, adding he could not help it. Declarations of defendants were testified to, tending to prove that L. had given to defendant B. a bill of sale of the coal, before delivery. When the sheriff seized the coal,

under process in this action, L. said: "It looks so much like a swindle, I am ashamed of it." *Held* (EARL and GRAY, CC., dissenting), that there was sufficient evidence to justify the finding that the payment of the price was a condition precedent to the vesting of the title in L., and that such condition had not been waived. *Id.*

*See* PRINCIPAL AND AGENT, 3, 4.

#### VESSELS.

*See* INSURANCE (MARINE).  
SHIPPING.

#### VILLAGES.

*See* ASSESSMENT AND TAXATION, 13,  
14, 15.

#### VOUCHER.

*See* FINDINGS OF LAW AND FACT, 1.

#### WAIVER.

Where an action is commenced to compel the determination of conflicting claims to real property, a defendant, by appearing and taking part in the proceedings to judgment without objection, will be held to have waived any objections to the regularity of the proceedings, and cannot thereafter object that the proceedings should have conformed to the provisions of the Revised Statutes as amended. *Fisher v. Hepburn.* 41

*See* PARTIES, 4.

SALES, 2, 3.

SHIPPING, 4.

*Hadden v. Dimick* (Mem.), 661.

#### WAREHOUSEMEN.

*See Taylor v. Spader* (Mem.), 664.

#### WARRANTY.

*See* INSURANCE (MARINE), 3, 4.

#### WASTE.

*See* CAUSE OF ACTION, 5.

#### WILLS.

1. In constructing wills, the law favors a construction that will not tend to the disinheriting of heirs, unless the intention to do so is clearly expressed. That meaning is to be preferred which inclines to the side of the inheritance of the children of a deceased child. *Scott v. Guernsey.* 106

2. The will of S., after a devise of certain premises to his daughter, P. G., during her life, contained the following clause: "Then to be equally divided amongst her now surviving children, or any of them that may be alive at her decease, or the heirs of any that may be dead at the time of executing this my last will." *Held*, that the time referred to was the time the will takes effect, by vesting the estate in possession upon the death of P. G.; that the word "heirs" was used in the sense of children; and that the intent of the testator was that the children of P. G. should take, if living at her decease, or if any were then dead, leaving children surviving, that the children should take in place of the parent. *Id.*

*See Magaro v. Field* (Mem.), 668

*Ex. J. G.*

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